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Supreme Court, U.S.
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No. 408 MAY 28 2003

IN THE OFFICE OF THE CLERK

Supreme Court of the United States

LORENA DADDARIO, AS PERSONAL REPRESENTATIVE OF FRANCIS E. DADDARIO,

Petitioner,

v.

THE CAPE COD COMMISSION,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

PETITION FOR WRIT OF CERTIORARI

THOMAS OWEN MORIARTY*
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QUESTIONS PRESENTED.

1. Whether an estate in land which is separately recognized and protected by state property law should be used as the denominator against which loss of value is to be measured in applying the "parcel as a whole" rule in categorical regulatory takings analysis under the Fifth Amendment.

2. Whether a partial regulatory taking in violation of the Fifth Amendment can be established where a property retains substantial after-imposition economic value.

3. The trial court found that the Respondent's permit denial was a regulatory taking in violation of the Fifth Amendment. The Supreme Judicial Court of Massachusetts vacated the trial court judgment, ruling that no taking had occurred. The Massachusetts Supreme Judicial Court went onto hold, *sua sponte*, that Petitioner's constitutional takings claim was not ripe for judicial review. The questions presented are:

a. Whether prudential ripeness is jurisdictional in nature, such that an appellate court may consider the issue despite the Respondent regulatory agency's concession of the issue at trial and on appeal.

b. Whether the futility exception to the prudential ripeness requirement rendered Petitioner's regulatory takings claim appropriate for judicial review.

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INTRODUCTION.

Lorena Daddario, as personal representative of Francis E. Daddario, ("Petitioner") hereby Petitions this Court for a Writ of Certiorari to review the decision of the Supreme Judicial Court of the Commonwealth of Massachusetts entered on July 11, 1997. This decision declared the Petitioner had not established either a categorical or a partial regulatory taking of any interest in his real property and that Petitioner's regulatory takings claims under the Fifth Amendment to the United States Constitution were not ripe for judicial review.

OPINIONS BELOW.

The case was decided in the Land Court Department of the Trial Court of the Commonwealth of Massachusetts (the "trial court") with written opinion. The opinion of the Land Court is reproduced in the appendix. (See Appendix p. 1a, hereinafter ("A. p. ___a)"). The opinion of the Supreme Judicial Court of the Commonwealth of Massachusetts, dated July 11, 1997 is reported at 425 Mass. 411 (1997). This decision (the "Decision") is reproduced in the appendix. (A. p. 20a).

After remand the Land Court issued an Order as to the Scope of Proceedings on Remand dated December 1, 1997 and thereafter a Decision on November 22, 1999 and final judgment with written opinion on September 19, 2000. The opinion of the Appeals Court of the Commonwealth of Massachusetts after remand, dated December 18, 2002 is reported at 56 Mass. App. Ct. 764 (2002). This decision (the "Appeals Court Decision") is also reproduced in the appendix. (A. p. 31a).

JURISDICTION.

The Supreme Judicial Court entered its original Order on July 11, 1997 remanding the case to the Land Court. Prior to the remand, on December 15, 1997, this Honorable Court denied a Petition for Writ of Certiorari filed by Petitioner Daddario. After remand, the Appeals Court entered an Order on December 18, 2002. Petitioner Daddario timely filed a Request for Further Appellate Review with the Supreme Judicial Court. The Supreme Judicial Court denied Daddario's Request for Further Appellate Review on February 27, 2003 (438 Mass. 1110). (A. p. 44a). This Petition is being filed within ninety (90) days of the date of the Supreme Judicial Court's denial of said Request for Further Appellate Review. Jurisdiction is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED.

The Fifth Amendment to the United States Constitution provides, in pertinent part, as follows: "nor shall private property be taken for public use, without just compensation." The Fourteenth Amendment to the United States Constitution provides, in relevant part, as follows: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law."

STATEMENT OF THE CASE.

Petitioner Daddario seeks review of the Decision of the Supreme Judicial Court of the Commonwealth of Massachusetts which held that the denial by the Cape Cod Commission (the "Respondent") of a Development of Regional Impact ("DRI") permit to extract loam, sand and gravel from his property was not a taking

without just compensation in violation of the Fifth Amendment to the United States Constitution. Petitioner Daddario further seeks review of the Decision of the Supreme Judicial Court that his regulatory takings claims were not ripe for judicial review.

A. *How the Federal Question Was Presented.*

The Petitioner raised his regulatory takings claim under the Fifth and Fourteenth Amendments to the United States Constitution in his original complaint filed with the trial court on March 1, 1995. The trial court, in its opinion dated June 14, 1996, specifically found:

> In consideration of the foregoing I find that the action of the Commission in disapproving the proposed DRI constitutes a taking of property in violation of the Massachusetts and United States Constitutions....

(A. p. 16a) In vacating the trial court's judgment, the Supreme Judicial Court provided, in relevant part, as follows:

> In deciding this case we consider both the Federal ripeness doctrine and regulatory taking principles and determine that both lead to the conclusion that the result below cannot be affirmed.

(A. p. 25a) The issues presented by the Petitioner herein, therefore, were clearly considered by the

Massachusetts Supreme Judicial Court and form the basis of that state court decision.

B. *Material Facts.*

Petitioner acquired title to the subject premises, consisting of approximately seventy acres of land in Falmouth, Massachusetts (the "Locus"), by deeds recorded in 1964, for the primary purpose of mining the surface and subsurface borrow material therefrom. Petitioner has been the sole owner of the Locus since acquisition.

On or about February 25, 1994, Petitioner filed an application with the Town of Falmouth for approval of a required special permit to extract loam, sand and gravel from the Locus. Petitioner's proposal called for the phased excavation of sand and gravel from approximately thirty-one acres of his approximately seventy-acre parcel. The proposal provided for reclamation, including grading, loaming and seeding of each of seven phases and a 200-foot buffer with all abutters as required by the Falmouth Zoning By-Law. The Falmouth Zoning Board of Appeals determined that the proposed project constituted a development of regional impact ("DRI") under the Cape Cod Commission Act (the "Act") and immediately referred the application to the Respondent Commission on March 11, 1994.

The Respondent is a regional planning agency created by the state Legislature in 1989. The Respondent has permit authority relating to, among other things, commercial developments of regional impact, as Petitioner's proposal was classified. The Respondent has promulgated regulations with which proposals for DRI permits must comply. Jurisdiction is concurrent with the Town, and after DRI review, proposals must also be permitted by the local regulatory agency.

After conducting several hearings, the Respondent denied the Petitioner's application on February 2, 1995. Prior to the denial and during the review process, Respondent's staff suggested two facially infeasible "alternative" plans of excavation to Petitioner. The first proposal, dated May 24, 1994, called for the complete excavation of the 200-foot buffer to the east of the Locus, in contravention of the Town of Falmouth By-Law. The second proposal, dated September 20, 1994, authorized significantly less excavation than the first "alternative," and also would have involved complete excavation of the 200-foot buffer to the east of the Locus. After the denial, the Petitioner filed an action in the Land Court claiming, *inter alia*, that the Respondent's denial constituted a regulatory taking under the State and Federal Constitutions.

Subsequent to the trial of this action in the Land Court, Petitioner was granted a hearing before the Board of Appeals of the Town of Falmouth, and the project as proposed was granted a special permit by the Town on October 13, 1996.

The trial court, in a decision dated June 14, 1996, held that the denial of the DRI Permit constituted a taking under the Massachusetts and the United States Constitutions. The trial court applied an *ad hoc* test in analyzing the takings issue, including three main factors: economic impact, interference with investment-backed expectations, and the character of the government action. On the question of economic impact, the trial court held that there had been "a denial of economically viable use of the property as a result of the regulatory imposition," finding "that prior to the [Respondent's] actions herein, Locus had substantial value as a sand and gravel operation and that thereafter it had little or none." (A. p. 13-14a) The trial court went on to find that while "Locus may still have substantial value for other development," the evidence, which included the magnitude of the

financial loss, demonstrated that "the action of the [Respondent] has crossed the line from a noncompensable 'mere diminution' to a compensable taking." (A. p. 14a)

The trial court made no specific factual findings as to the value of the Locus as regulated. The Respondent's expert estimated the value of the property as regulated to be $550,000.00 to $600,000.00 for residential uses. The Petitioner's expert testified that the only feasible remaining use of Locus was as conservation land and ascribed a value of $465,000.00. The Petitioner's expert provided the only expert opinion as to the value of Locus as a sand and gravel mine. If this unchallenged estimate as to the value of the property as a sand and gravel mine is accepted, the residual value of the property for residential uses reflects a seventy-eight percent (78%) loss of value in Locus as regulated, while sale as conservation land will result in an eighty-two percent (82%) loss of value in the property as regulated.

The Respondent appealed the trial court's decision. The Supreme Judicial Court of Massachusetts granted Respondent's petition for direct appellate review. On appeal, the Supreme Judicial Court of the Commonwealth of Massachusetts vacated the judgment of the trial court, and found no taking. The Petitioner argued on appeal that the loss of his mining estate constituted a categorical taking of that property interest. The Supreme Judicial Court, citing *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987) and *Hodel v. Virginia Surface Mining and Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981), found that the restriction of a landowner's right to extract minerals from his property is not necessarily a regulatory taking, reasoning that the "property as a whole retains substantial value." The Supreme Judicial Court made no reference to Petitioner's claim that he owned a separate and distinct mining estate recognized for takings purposes by state law.

The Supreme Judicial Court, concluding that the regulatory action involved neither a physical invasion nor a complete deprivation of use, then articulated "several interrelated factors which are to be considered in determining whether a compensable taking has occurred" (A. p. 27a), including (1) the economic impact on the Petitioner; (2) interference with Petitioner's distinct investment-backed expectations; and (3) the character of the governmental action. The court concluded on the merits of Petitioner's takings claim that because "the property has substantial economic value for other uses" (A. p. 30a), there was no taking. The Supreme Judicial Court provided no discussion of the interrelated factors listed above.

The Supreme Judicial Court, despite ruling on the merits of Petitioner's takings claim, also found that the claim was not ripe, as no final determination had been reached by the Respondent. The Supreme Judicial Court reasoned that the denial of one application, submitted with "requisite materials" (A. p. 23a), did not result in a final determination. The Supreme Judicial Court also relied on the "alternative" plans for buffer excavation suggested by the Respondent's staff, which it found "would have permitted sand and gravel extraction on twenty-five acres" (A. p. 29a), despite acknowledging earlier in its Decision that the Town By-Law required the 200-foot buffer with abutting properties. (A. p. 23a n.1) The Supreme Judicial Court did not analyze the language of the Respondent's DRI permit denial itself in its discussion of ripeness, nor did it consider that the Respondent had conceded the ripeness issue both at trial and on appeal.

REASONS FOR GRANTING WRIT.

The Petitioner respectfully submits that certiorari should be granted because the case presents significant unsettled issues in the area of regulatory takings jurisprudence. The Petitioner's claim of a categorical taking of his mining estate raises a difficult, persisting question specifically left unanswered by this Court in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 n.7 (1992) and in *Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001), namely, what is the proper denominator against which loss is to be measured in connection with regulatory takings analysis. The case also presents the Court with the opportunity to resolve the unsettled question of whether substantial remaining after imposition value is a bar to a partial takings claim under the ad hoc analysis articulated by the Court in *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978). The ripeness issues allow the Court to speak definitively as to: (1) whether an appellate court can raise the ripeness issue *sua sponte* after a party has conceded same at trial and on appeal; and (2) the factors which should be considered in assessing prudential ripeness and the futility exception thereto.

A. *The Categorical Taking and the Denominator Issue.*

This case affords the Court an opportunity to address (1) the limits, if any, on the "parcel as a whole theory" and (2) whether, in certain circumstances, a distinct estate in land can and should properly be considered the "parcel as a whole."

By granting certiorari on the categorical takings claim presented by the Petitioner, the Court can establish a consistent rule concerning the determination of the denominator or "property

interest" against which loss of value should be measured where distinct estates are implicated in categorical regulatory takings analysis. As this Court has observed, the rule regarding "deprivation of all economically feasible use" lacks precision, due to the uncertainty associated with the determination of the appropriate denominator. *Lucas v. South Carolina Coastal Council*, 505 U.S. at 1016 n.7. The *Lucas* Court suggested, but did not decide, that the appropriate inquiry in establishing the denominator is a consideration of the legal recognition and protection afforded a particular property interest under state law. While it is true the traditional analysis has been characterized as focusing on "the parcel as a whole", *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 327-28 (2002), it remains clear that, at least in certain circumstances, the whole parcel can appropriately be defined as an estate less than the full bundle of property rights. *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 498 (1987). This "difficult, persisting question" was raised in *Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001) but the *Palazzolo* Court, while noting an "expressed discomfort with the logic of this rule" in certain decisions, did not have an opportunity to address it as the petition for certiorari in that case did not present the issue. The decision of this Court in *Tahoe-Sierra Preservation Council v. Tahoe Reg. Planning Agency*, 535 U.S. 302 similarly left this question unanswered as the *Tahoe-Sierra* Court addressed only the question of whether a fee simple interest could be temporally divided for takings analysis. Unlike *Palazzolo*, Petitioner's categorical taking claim is presented to this Court on the premise that the mining estate is the proper denominator for takings analysis in this context. In this case, the Massachusetts Supreme Judicial Court improperly combined the Petitioner's

mining estate and his residual interest in the surface estate in determining the denominator for its takings analysis under a "parcel as a whole" theory. Further direction from this Court on the issue is essential, given the conflicts in decision and principle which exist between and among the circuits and states and given the reservations previously expressed by this Court.

The Supreme Judicial Court's application of the "parcel as a whole" theory to the Petitioner's separate and distinct mining estate appears to conflict directly with the decision of the Federal Circuit Court of Appeals in *Whitney Benefits, Inc. v. U.S.*, 926 F.2d 1169 (Fed. Cir. 1991), *cert. denied*, 502 U.S. 952 (1991). Relying on the decisions of this Court in *Keystone* and *Hodel*, the Supreme Judicial Court concluded that the loss of mineral rights is not necessarily a taking when the "property as a whole" retains substantial value—interpreting "property as a whole" as both the Petitioner's mining estate and his separate interest in the surface estate. In *Whitney Benefits*, the holding of the Federal Circuit Court established that where state property law recognizes separate mineral and surface estates, and mineral rights are properly subject to the takings clause of the Fifth Amendment, the estate against which loss is to be measured for takings purposes is the mineral estate, and the inquiry does not implicate the uses, if any, of the remaining surface estate. 926 F.2d at 1174.

The Federal Circuit Court in *Florida Rock Indus. v. United States*, 18 F.3d 1560 (Fed. Cir. 1994); *cert. denied*, 115 S. Ct. 898 (1995) also considered a property owner's right to mine subsurface minerals as a separate "property interest," the destruction of which would constitute a compensable taking. 18 F.3d at 1572. The Tenth Circuit, however, in *Clajon Prod. Corp. v. Petera*, 70 F.3d 1566 (10th Cir. 1995), specifically rejected the *Florida Rock* approach, relying

on *Penn Central* in concluding that the *Florida Rock* approach inappropriately divided a single parcel into discreet segments. The Supreme Court of Wisconsin, in *Zealy v. City of Waukesha*, 548 N.W.2d 528 (Wis. 1996), also rejected the *Florida Rock* approach relying on *Keystone*, finding it inappropriate to segment a contiguous property to determine the denominator for takings purposes. The Supreme Court of Ohio in *State ex rel. R.T.G., Inc. v. State*, 780 N.E. 2d 998 (2002) and the Supreme Court of Pennsylvania in *MachiPongo Land and Coal Co., Inc. v. Com.*, 799 A. 2d 751 (2002) reached similar holdings.

The importance of resolving this question is underscored by the fact that decisions of this Court in regulatory takings cases involving distinct estates in real property can, themselves, be viewed as inconsistent. In *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922), a mining case, the Court first analyzed the separate real property estates recognized by the Commonwealth of Pennsylvania, concluding that support by the subjacent strata was a separate support estate entitled to recognition for takings purposes. The Court then held that a regulation which effectively denied all economic use of the support estate was a taking in violation of the Fifth Amendment. 260 U.S. at 414. In *Keystone*, a very similar mining rights case, the Court again analyzed the separate and distinct estates recognized by the Commonwealth of Pennsylvania, but concluded that a similar regulation of the support estate was not a taking. While the Court came to different conclusions in each case attributable, at least in part, to the Court's conclusion in *Keystone* that as a practical matter the support estate's dependent association with either the mining or the surface estate prevented its consideration as a separate estate for takings purposes, the Court clearly considered the mining estate as a distinct whole parcel for regulatory takings analysis.

In *Penn Central*, this Court rejected an argument advanced by the property owner based, at least in part, on its loss of the allegedly separate rights it possessed in the air space above an existing building. The *Penn Central* Court provided no discussion of the extent to which the property laws of the State of New York recognized a separate and distinct estate in air rights. Similarly, *in dicta* in *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, 452 U.S. 264, 288 (1981), another pre-*Lucas* takings case involving the loss of mining rights under a Virginia statute, the Court held that a property owner had not been deprived of economically viable use of his property where, *inter alia*, the act did not purport to regulate or proscribe non-mining uses of such land. Again, however, the Court did not engage in any analysis of the extent to which the Commonwealth of Virginia recognized a separate and distinct mining estate.

A grant of certiorari also presents this Court with an opportunity to address how the continued ownership of, or the previous severance of, other estates or interests in a subject locus impacts categorical taking analysis. Both the *Pennsylvania Coal* and *Keystone* Courts analyzed the taking of the mining estate without consideration of the remaining value of the surface estate ostensibly because the severance of the two estates occurred decades before. 480 U.S. at 478. In *Hodel*, the non-mining uses of the surface estate were considered in connection with the Court's categorical taking analysis. With this case the Court can determine if the viability of a categorical taking claim of a separately recognized estate is contingent simply upon whether the property owner has previously sold and already realized the value of its other estates and/or interests in land.

The Petitioner, therefore, respectfully requests that this Court grant certiorari to resolve these longstanding and unsettled questions and establish a

rule that where state property law recognizes a separate estate in land and accords legal recognition and protection to such separate estate, such estate should be treated as a distinct whole parcel and used as the denominator for categorical takings analysis.

B. *The Partial Taking Issue.*

This case also gives the Court an opportunity to answer another significant question left open in *Lucas*: whether loss of a substantial part, but not essentially all, of the economic use of a property can result in a regulatory taking. 505 U.S. at 1017, n.8. The clarification of this issue will also resolve conflicts between and among the federal circuit courts and state courts on this question.

The decision of the Supreme Judicial Court, that substantial after-imposition economic value is an absolute bar to a partial takings claim, conflicts in principle with the Federal Circuit Court of Appeals decisions of *Yancey v. U.S.*, 915 F.2d 1534 (Fed. Cir. 1990) and *Florida Rock Indus. v. United States*, 18 F.3d 1560 (Fed. Cir. 1994), *cert. denied*, 115 S.Ct. 898 (1995). In *Yancey*, the Federal Circuit, in finding a taking where property value went from $91,616.00 to $20,887.00, held, without equivocation, that there exists no automatic numerical barrier preventing compensation in a partial takings case, but that the court must weigh all relevant considerations, including percentage diminution, in assessing the severity of the economic impact to a property owner. 915 F.2d at 1541. The Federal Circuit in *Florida Rock*, in considering whether a partial taking could be found where a regulation deprives an owner "of a substantial part but not essentially all of the economic use or value of the property," noted that "the Fifth Amendment prohibits the uncompensated taking of private property without reference to the owner's remaining property interests." 18 F.3d at 1568. The

Ninth Circuit has also found a taking where a property retained significant value. *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422 (9th Cir. 1996) (sale of property to State of California for $800,000.00 more than the purchase price not dispositive on economic impact for takings purposes).

The bar imposed by the Supreme Judicial Court in this case, however, is not novel. Since this Court decided *Lucas*, the Supreme Court of the State of Wisconsin, in *Zealy v. City of Waukesha*, 548 N.W.2d 528 (Wis. 1996), relying in part on *Lucas*, found that where a parcel "retains substantial uses . . . we cannot conclude that the City's rezoning deprived [property owners] of all or substantially all the use of his land," concluding that without such loss "a taking cannot occur." 548 N.W. 2d at 534. Similarly, the Eleventh Circuit, in *Corn v. City of Lauderdale Lakes*, 95 F.3d 1066, 1072–74 (11th Cir. 1996) *cert. denied*, 114 S.Ct. 1400 (1996) appears flatly to reject any possibility of a regulatory taking where a property has remaining economic use, concluding that the standard for a taking is whether a regulation has denied all or substantially all economically viable use of land.

The *Tahoe-Sierra* Court did not resolve this issue. The *Tahoe-Sierra* Court noted a reluctance to adopt per se rules in partial regulatory takings cases but this observation related to how the different ad hoc factors should be weighed in undertaking a partial taking analysis. The question presented herein is whether remaining substantial economic use is a prior bar which obviates the need to even engage in an ad hoc partial takings analysis.

It is, therefore, vital that the Court resolve this conflict and determine whether remaining substantial economic use is an absolute bar to a partial takings claim or whether, despite such remaining economic use, an unconstitutional taking may still be found applying the *ad hoc* factors analysis of *Penn Central*.

C. *The Ripeness Issues.*

By granting certiorari on the ripeness issue the Court can determine whether an appellate court can raise prudential ripeness *sua sponte* following a concession of ripeness at the trial level and on appeal.

The Supreme Judicial Court's treatment of prudential ripeness as a jurisdictional matter which cannot be waived or conceded by a regulatory agency fails to recognize the fact-intensive nature of the ripeness inquiry and should not stand. This is not an isolated concern, as the question was addressed by the Ninth Circuit in *Trawеek v. City and County of San Francisco*, 920 F.2d 589 (9th Cir. 1990) and by the Fifth Circuit in *Hidden Oaks Limited v. City of Austin*, 138 F.3d 1036 (5th Cir. 1998), each of which also found prudential ripeness to be jurisdictional. By granting certiorari, the Court can address this issue on unambiguous facts. The Petitioner contends that a regulatory agency's concession of prudential ripeness at trial must be binding, particularly where the Petitioner has necessarily acted to his detriment in reliance thereon in accepting the concession and omitting evidence relating thereto at trial.

By granting certiorari this Court has an opportunity to distinguish between purely "jurisdictional" matters which are beyond a party's ability to waive and fact dependent prudential ripeness considerations which are clearly within the power of the applicant to unilaterally establish at trial and within the power of the Respondent to concede at trial. This Court should, therefore, grant certiorari to establish that fact dependent prudential ripeness considerations are not jurisdictional and may be conceded by the parties at the trial level.

In granting certiorari, the Court can also further develop the scope of the futility exception to the prudential ripeness requirement. This Court did not have such an opportunity in *Suitum*, as the question

presented did not involve a discretionary decision by the regulatory agency. Similarly, the decision by this Court in *Lucas*, concerning the futility of submitting a plan for development, was based on the non-discretionary nature of the regulation involved. Similarly the Court's decision in *Palazzolo*, which relied significantly upon the unequivocal nature of the wetland regulation at issue, does not resolve this issue. In this case the Respondent clearly had the ability to authorize excavation of a smaller area on the subject locus. The question is whether the articulation of only facially infeasible alternatives is sufficient evidence of futility in this context. It is respectfully requested that this Court grant certiorari to further develop the law regarding those factors which a court should, or may, consider in applying the futility exception.

CONCLUSION.

For all of the foregoing reasons, Petitioner Francis E. Daddario respectfully requests this Honorable Court to grant his petition for certiorari to the Supreme Judicial Court of the Commonwealth of Massachusetts.

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APPENDIX A

COMMONWEALTH MASSACHUSETTS

LAND COURT

DEPARTMENT OF THE TRIAL COURT

BARNSTABLE, SS. MISCELLANEOUS
CASE NO. 215603

FRANCIS E. DADDARIO,
Plaintiff

vs.

THE CAPE COD COMMISSION,
Defendant

DECISION

Plaintiff Francis E. Daddario ("Plaintiff") filed a complaint for judicial review on March 1, 1995, pursuant to Chapter 716 of the Acts of 1989, as amended, An Act Establishing the Cape Cod Commission ("the Act"), and for declaratory relief pursuant to G. L. c. 185, § 1, and c. 231A, § 1 et. seq., and damages arising from the Cape Cod Commission's denial of a Development of Regional Impact permit involving certain property owned by Plaintiff in Falmouth. Plaintiff also alleges an unconstitutional regulatory taking of said property and requests that this court annul the decision of the Cape Cod Commission, approve Plaintiff's application and declare that the actions of the Cape Cod Commission are unlawful, unenforceable and a violation of Plaintiff's constitutional rights.

The trial commenced on January 29, 1996. It was held over six days and concluded on February 8, 1996. The proceedings were recorded and transcribed by a court-approved stenographer. Thirteen witnesses

testified and sixty-one exhibits were introduced into evidence. All exhibits are incorporated herein by reference for the purpose of any appeal. A view of the subject property was taken by the court, in the presence of counsel, on April 1, 1996.

After reviewing the evidence and considering the pleadings filed by the parties, I make the following findings of fact.

1. Plaintiff is an individual residing at Plaza East, Apartment PHL, 4300 North Ocean Boulevard, Ft. Lauderdale, Florida.

2. Defendant Cape Cod Commission ("the Commission"), the planning and land use commission for Barnstable County, was established pursuant the Act, which became effective on or about January 16, 1990. The Commission has an address and principal place of business at 3225 Main Street, Barnstable.

3. By deed dated January 7, 1964, and recorded with the Barnstable Registry of Deed in Book 1245, Page 41, Plaintiff acquired title to three parcels of land containing approximately 52 acres in Falmouth. By separate deed dated April 24, 1964, and recorded in Book 1259, Page 436, Plaintiff acquired a fourth parcel, contiguous with one or more of the other three parcels, located on Thomas Landers Road in Falmouth. Plaintiff has been the sole owner of all four parcels since acquisition. The four parcels comprise the subject property ("Locus") in this action.

4. Locus consists of approximately 70 acres of vacant land in Falmouth. Locus is bordered to the north by Thomas Landers Road, a public way, and to the northwest by Shallow Pond. To the west, Locus is bordered by a sand and gravel mining operation and by land owned by the Town of Falmouth. To the south, Locus is bordered by a residential neighborhood of single family homes, and to the northeast Locus is bordered by another sand and gravel mining operation.

5. Under the Town of Falmouth Zoning By-Law ("the Bylaw") in effect presently and at the time of Plaintiff's petition, Locus is and was located in an AGA

(agricultural) zoning, district. Article XXIX of the Zoning By-law allows earth removal in an AGA zoning district upon the issuance of a special permit by the Town of Falmouth Board of Appeals.

6. On February 25, 1994, Plaintiff filed an application with the Town of Falmouth for the approval of a special permit for the Daddario Gravel Mining Operation ("the proposed project") to extract sand and gravel from Locus.

7. The proposed project calls for the extraction of sand and gravel in seven phases from areas referred to as "cells", each cell comprised of five acres or less. After extraction, each cell would be reclaimed through grading, loaming, and seeding prior to commencement of work on the following phase, in accordance with the By-Law. The entire project is proposed with 200' buffer strips around the edges, as required by the By-Law.

8. The application for the proposed project was referred to the Commission by the Falmouth Zoning Board of Appeals on March 11, 1994, as a Development of Regional Impact ("DRI") of "outdoor commercial space greater than forty thousand square feet." Plaintiff submitted a DRI application form with requisite materials and application on June 28, 1994.

9. The 90-day period in which the Commission must conduct its public hearing was extended by agreement of the parties, and public hearings were held on August 2 and December 1, 1994.

10. After the public hearings, the Commission issued a decision dated February 2, 1995, denying Plaintiff's application for a DRI permit under sections 12 and 13 of the Act. The Commission concluded that the proposed project "would not enhance or protect open space on the site in a way that respects the importance of sensitive natural resources of Cape Cod." Plaintiff appeals said denial in this case.

The Cape Cod Commission Act

11. The Commission was established because Cape Cod

> possesses unique natural, coastal, scientific, historical, cultural architectural, archaeological, recreational, and other values; there is a regional, state and national interest in protecting, preserving and enhancing these values; and these values are being threatened and may be irreparably damaged by uncoordinated or inappropriate uses of the region's land and other resources.

St. 1989, c. 716, § 1(a).

12. The Commission's purpose is to further

> the conservation and preservation of natural undeveloped areas, wildlife, flora and habitats for endangered species; the preservation of coastal resources including aquaculture; the protection of groundwater, surface water and ocean water quality as well as the other natural resources of Cape Cod; balanced economic growth; the provision of adequate capital facilities, including transportation, water supply, and solid, sanitary and hazardous waste disposal facilities; the coordination of the provision of adequate capital facilities with the achievement of other goals; the development of an adequate supply of fair affordable housing; and the preservation of historic, cultural, archaeological, architectural, and recreational values.

Id. § 1(c).

13. The Commission is charged with preparing a Regional Policy Plan the goal of which is to "present a coherent set of regional planning policies and objectives to guide development throughout said Barnstable County and to protect the region's resources, and which shall reflect and reinforce the goals and purposes set but in section one." Id. § 7(a)

14. The Commission is further charged with reviewing and regulating Developments of Regional Impact ("DRI"), pursuant to § 1(b) of the Act. A DRI is defined as a

> development which because of its magnitude or the magnitude of its impact on the natural or built environment, is likely to present development issues significant to or affecting more than one municipality, and which conforms to the criteria established in the applicable standards and criteria for developments of regional impact pursuant to Section 12.

Id. § 2(h).

15. The Act further provides that any proposed industrial development comprised of outdoor commercial space greater than 40,000 Square feet is presumed to be a DRI. Id. § 12 (c)(6).

16. If a proposed development meets the standards and criteria for a DRI the Commission will review the proposed development either by referral from a municipal agency or upon its own determination once a municipal agency refers the proposed development to the Commission or receives notice of the Commission's intent to review, the municipal agency shall suspend its review of the application. Id. § 12(h).

17. The suspension of municipal agency review has the effect of extending "all constructive grant periods for municipal agencies for a period equal to the duration

of commission review, such periods to resume running after a final commission decision is rendered." Id.

18. Upon the receipt of a proposed DRI the commission is charged with reviewing the proposal for its consistency with the Act, the RPP and the local comprehensive plan. The Commission may approve the proposal if it finds that (1) the probable benefits from the project outweigh the probable detriments and (2) the project is consistent with the RPP, and the local comprehensive plan, and (3) the proposed development is consistent with the municipal development by-law. Id. § 13(d).

19. The Commission may approve, approve with conditions or disapprove a proposed DRI. If the commission disapproves a DRI, no further work may be done on the development. Id. § 13(e).

20. Section 13(f) of the act provides that

> Notwithstanding the provisions of subsection (d) of section thirteen, the commission shall approve or approve with conditions a development or regional impact where an applicant demonstrates that to disapprove the development of regional impact would constitute a taking of property in violation of the Massachusetts and United States Constitutions; provided, however, that no reasonably foreseeable danger to the public health or safety will arise from such approval or approval with conditions.

21. Any party aggrieved by a decision of the Commission regarding a DRI may appeal the Commission's decision to the Barnstable Superior Court or the Land Court. Id. § 17(b).

22. Pursuant to section 17(d) of the Act, this court is directed to

> hear all evidence pertinent to the authority of the commission and determine the facts, and, upon the facts as so determined, annul such decision if found to exceed the authority of said commission or make such other decree as justice and equity may require.

This standard is identical to that found in G. L. c. 40A, § 17 for judicial review of decisions of a board of appeals or special permit granting authority. In such instances "no special weight attaches to either the conclusions of law or findings of fact of a board of appeals on judicial review. . . . The trial judge hears the matter de novo and 'determines the legal validity of the decision of the board upon the facts' which the judge finds." Needham Pastoral Counseling Center Inc. v. Board of Appeals of Needham, 29 Mass. App. Ct. 31, 32 (1990), (citing Josephs v. Board of Appeals of Brookline, 362 Mass. 290, 295 (1972)).

The Regional Policy Plan

23. Pursuant to the Act, the RPP was duly approved by the Barnstable County Assembly of Delegates and became effective September 6, 1991.

24. The RPP, a planning and regulatory document, establishes review and regulatory policies applicable to DRIs. The RPP provides Minimum Performance Standards ("Standards") which set forth mandatory minimum standards for future development.

25. The RPP explains that if an applicant demonstrates that the interests protected by a given Standard are better served by an alternative approach, the Commission may modify the application of said Standard. Regional Policy Plan, p. 9. In this instance, the Commission made no such modifications.

26. The parties have stipulated that the language of the Commission's decision (Exhibit 1) notwithstanding, the proposed development is consistent with all applicable Standards except the following: 2.1.1.2 A.2;

2.1.1.3; 2.4. 1.1 B. 1; 4.1.1.1; 4.1.1.2; 4.1.1.3; 4.1.2.1; 4.2.2.3; 4.3.1.1; 6.1.1; 6.1.4; and 6.1.5.

27. Standards 2.1.1.2 A.2, 2.1.1.3 and 2.4.1.1 B.1 all deal with the protection of natural resources, specifically water resources, wildlife and plant habitat, as follows:

> a. Commercial and industrial development and redevelopment that involves the use, treatment, generation, storage or disposal of hazardous wastes or hazardous materials, with the exception of retail sales and household quantities, shall not be permitted. RPP
>
> Standard 2.1.1.2 A.2
>
> b. Development and redevelopment shall identify proposed wells and existing private wells on abutting properties within 400 feet and assess the impact of the development on the water quality of these wells. Septic systems shall be sited so as to avoid contamination of existing or proposed wells. RPP Standard 2.1.1.3.
>
> c. Applications for Developments of Regional impact that propose to alter such areas shall contain a wildlife and plant habitat assessment. Such assessments shall identify the presence and location of wildlife and plant habitat, including vernal pools, and be a guide for the layout of the development. Developments shall be planned to minimize impacts to vegetation and wildlife. RPP Standard 2.4.1.1 B.1.

28. Standards 4.1.1.1, 4.1.1.2, 4.1.1.3, 4.1.2.1, 4.2.2.3, and 4.3.1.1 relate to community facilities and services including transportation, solid and hazardous

waste management and capital facilities and infrastructure, as follows:

> a. Development and redevelopment shall not degrade the existing levels of service (LOS) of surrounding roads and intersections .... Where existing levels of service are below these specified levels, development and redevelopment shall maintain or improve performance indicators .... PPP Standard 4.1.1.1.
>
> b. Developments of Regional Impact shall mitigate any traffic impacts that are created by such developments. The mitigation strategies shall include both structural and nonstructural improvements, with special emphasis on alternatives to private automobile transportation. Necessary improvements shall occur concurrently with any development or a contribution of funds toward the necessary improvements shall be provided .... RPP Standard 4.1.1.2.
>
> c. Development and redevelopment shall comply with permissible forms of mitigation ... [which] take into account not only road function and classification but the presence of environmentally sensitive areas, regional economic impacts and scenic and historic values .... RPP Standard 4.1.1.3.
>
> d. Developments of Regional Impact shall make provisions for alternate transportation modes to offset at least 20% of their projected traffic volumes.... In lieu of providing these services in-kind, the developer may make a contribution to the

Cape Cod Regional Transit Authority or a private transit company approved by the Commission in order to provide public transportation. RPP Standard 4.1.2.1.

e. Commercial and industrial development and redevelopment that involves the use, treatment, generation, storage or disposal of hazardous wastes or hazardous materials, with the exception of retail sales and household quantities, shall not be permitted within Wellhead Protection Districts. RPP Standard 4.2.2.3.

f. Approval of development and redevelopment which increases the intensity of use shall be based on existing infrastructure capability or on a development's ability to provide for or contribute the infrastructure and services necessary to support it. RPP Standard 4.3.1.1.

29. Standards 6.1.1, 6.1.4, and 6.1.5 relate to the preservation and availability of open space:

a. Development or redevelopment within the Capewide Open Space/ Greenbelt network . . . shall maintain its integrity by clustering away from sensitive resources and maintaining a continuous corridor to preserve both edge and interior wildlife habitat. RPP Standard 6.1.1.

b. Commercial development which qualities as a Development of Regional Impact shall provide 40% *of* the lot area excluding wetlands, as permanent open space including landscaped areas designed to screen and buffer the development ....

> Where appropriate, open space may be provided off site within the same town, or a contribution of funds may be made to the town for open space acquisition. . . . RPP Standard 6.1.4.
>
> c. In the design of developments, significant natural and fragile areas including critical wildlife and plant, water resources . . . and significant land forms shall be protected. RPP Standard 6.1.5.

The Falmouth Zoning By-Law

30. Article XXIX of the By-Law, Earthmoving Regulations, requires a special permit for such operations. Falmouth Zoning By-Law, § 240-150. Said special permit applications are subject to the procedures outlined in Article XXXXII of the By-Law, the Special Permit Procedures.

31. Earthmoving regulations require that a border bufferstrip of at least 100 from the side line of any road and 200 from all abutting property lines be provided, unless written consent of the abutting property owner has been received by the Board. Id. § 240-154B. Said regulations also require reclamation by grading, reloaming and seeding. Id. § 240-154 0(1)-(4). In addition, security in the form of a cash deposit or surety bond must be posted with the Town Treasurer to secure compliance with the reclamation requirements. Id. § 240-155.

32. Article XX of the By-Law, Wildlife Corridor, applies to any project requiring a special permit, and serves to "establish and protect permanent and contiguous corridors and special areas for feeding, breeding and normal home range movement of wildlife through the defined habitat. Id. § 240-91.

33. The Wildlife Corridor By-Law requires that the applicant establish contiguous corridors with a

minimum width of 300' across the subject site and to adjacent parcels and corridors. It also requires that natural, indigenous vegetation be encouraged or enhanced by the project and requires that disturbed areas be revegetated. Finally, it discourages "dramatic" changes in topography. Id.. §§ 240-94 A(2), A(5) and A(6).

As stated above, § 13(f) of the Act states in substance that where the applicant demonstrates that disapproval of the DRI would constitute a taking of property in violation of the Massachusetts and United States Constitutions, the Commission shall approve or approve with conditions the DRI, "provided no reasonably foreseeable danger to the public health or safety will arise from such approval. . . .

I find no competent evidence of any reasonably foreseeable danger to the public health or safety arising from the approval of the DRI or of its approval with conditions. Having so found I next consider whether or not the disapproval constitutes a taking in violation of the Massachusetts and/or United States Constitution.

The pertinent language of the Massachusetts Declaration of Rights, Article X, is as follows "but no part of the property of any individual can, with justice be taken from him, or applied to public uses without his consent . . . and whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefore. . . ." The United States Constitution states somewhat more simply in Amendment V "nor shall private property be taken for public use, without just compensation."

Clearly the objectives of the commission and their actions in denying the DRI were and are a sincere effort to protect the public interest.

> There can be no doubt today that every effort must be made . . . to protect our natural heritage and to pass it to future

> generations unspoiled. The destruction of ancient civilizations by human misuse of the environment, teaches the need for public policies that work with the natural environment rather than attempt radically to alter it. The question at issue here, is when the Government fulfills its obligations to preserve and protect the public interest, may the cost of obtaining that public benefit fall solely upon the affected property owner or is it to be shared by the community at large.

Loveladies Harbour, Inc. v. U.S., 28 F.3d 1171, 1175 (Fed. Cir. 1994). Clearly under the law today the costs of such preservation and protection must be shared by all property owners not just the relatively few whom the policy happened to adversely impact. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992); Agins v. Tiburen, 447 U.S. 255, 260 (1992); Loveladies, 28 F.3d at 1175, Florida Rock Industries, Inc. v. U.S., 18 F.3d 1560 (Fed. Cir. 1994).

Nor is a taking limited to situations where all economic benefit or viability is lost, because a partial loss, as opposed to a "mere diminution", can also be a taking. Florida Rock Industries, Inc., 18 F.3d at 1590. Loveladies sets forth certain criteria which, if met, will establish a regulatory taking. Such criteria as here applicable are as follows.

First there has been a denial of economically viable use of the property as a result of the regulatory imposition. Here Plaintiff seeks to operate a sand and gravel operation in seven phases with each phase involving approximately five acres, or a total of about thirty-five acres, on Locus which contains seventy acres. Each phase is to be reclaimed in compliance with the zoning by-law before work is begun in the next. The denial of the DRI has precluded such use.

I find that prior to the Commission's actions herein, Locus had substantial value as a sand and gravel

operation and that thereafter it had little or none. I base this finding on the testimony of Plaintiff and his expert, Dr. Cochrane. Plaintiff is not only the owner of Locus, he is also a successful businessman well versed in the construction and sand and gravel business. I do not find it necessary herein to determine precise before and after values, as the remedy provided for by the act is not money damages but, most likely in an effort to avoid such payments grant of the requested relief. I do find that even though Locus may still have substantial value for other development, the magnitude of the financial loss, as supported by the evidence, and the loss of an owner's right to use his property as he wishes certainly demonstrate that the action of the Commission has crossed the line from a noncompensable "mere Diminution" to a compensable taking.[1]

It must also be determined that the loss of rights and value is directly attributable to the actions of the Commission and not other legal or regulatory impediments, that the land is otherwise usable. Lopes v. Peabody, 417 Mass. 299, 306 (1994). The only such impediment herein involved is the Zoning By-Law of the Town of Falmouth under which the original petition was filed. It would appear from § 12(h) of the Act, above quoted, that after a DRI permit is finally acted upon the matter is returned to the local municipal agency which proceeds with the processing of the application. It further appears that failure of the local agency to so act may well result in a constructive grant.[2] The filing of the denial was a final action; however, in this instance and

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[1] I note the Act does not differentiate between taking and compensable taking, a difference that is herein moot for reasons stated.

[2] It appears in this matter that a constructive grant by the Board of appeals may have resulted from its non-action. For some reason not appearing herein, there is no record of Plaintiff attempting to perfect such remedy under c. 40A, § 9, perhaps because the remedy therein in the case of "no action" as opposed to no action after hearing, is somewhat unclear, to say the least.

acting on advice of the Commission, the Board has refused to act despite the request of Plaintiff. Interestingly the Commission advised the Board that it could act to deny the application, but could not approve it, as such action would be "working, on the project" a somewhat strained interpretation of the above section.

Inasmuch as the failure of the Board to act is directly' attributable to the Commission, I find and rule that the Commission may not raise the lack or necessity of action by the Board as defense to the taking claim.[3] Moreover, after a review of the proposal and the By-law, there appears to be a reasonable likelihood that the special permit will issue.

The second test is that the property owners had a distinct investment-backed expectation. It is uncontroverted that when Mr. Daddario purchased locus over thirty years ago he did so as a future investment. Considering the testimony and, the fact that he and his father before him were successful contractors, the location of Locus, and use made thereof, I find that such acquisition was done with an investment-backed expectation.

Lastly, the interest vested in the owner must be a matter of state property law and not within the power of the state to regulate under common law nuisance doctrine. Although a sand and gravel pit is probably a less than desirable activity to residential neighbors, the fact is that Locus is abutted by two sand and gravel operations and a concrete batching plant. Moreover, there are or have been other such operations in the general vicinity. Sand and gravel are valuable commodities much in demand for projects, both public and private, including capital facilities and affordable housing, throughout the Commonwealth, a fact recognized by the Town in establishing its Earth Removal By-law with which Plaintiff must still comply. Accordingly, I find that Plaintiff's rights in Locus vest as

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[3] The language of § 13(f) "notwithstanding the provisions of subsection (d)" may obviate the consideration of the Zoning By-Law.

a matter of property law, and not within the power of the state to regulate under common law nuisance doctrine.

In consideration of the foregoing I find that the action of the Commission in disapproving the proposed DRI constitutes a taking of property in violation of the Massachusetts and United States Constitutions and accordingly order the Commission to approve the DRI with conditions. Such conditions are limited to those standards stipulated to herein. Such conditions as may constitute a "taking" or contribute thereto are of course excluded.

Upon a reading and analysis of all the evidence pertinent to the authority of the Commission, as set forth in detail below, I find that some of the disputed Standards set forth in the parties, stipulation do not apply to the proposed project and shall not be included as conditions of the approval. Other standards are satisfied and conditions may be imposed to insure their compliance. It further appears doubtful that some of the remaining standards satisfy the "rough proportionality" standard established by the Supreme Court in Dolan v. Tigard, 114 S. Ct. 2309, 2319-20 (1994), which requires that the regulatory agency "make some sort of individualized determination that the required dedication is related both in nature and to the impact of proposed development."

I find that Plaintiff's proposed project complies with Standards 2.1.1.2 A.2 and 4.2.2.3 dealing with the storage of hazardous materials on the site, inasmuch as Plaintiff will use a service to fuel their vehicles on site as necessary, alleviating any need for storage. The approval may be conditioned on continued compliance with these Standards.

Plaintiff is not Proposing to install septic systems or put materials into the ground. In light of this and Plaintiff's commitment not to store petroleum or hazardous products on site, I find that there is no foreseeable circumstance in which the proposal will adversely impact water quality, and, accordingly, Standard 2.1.1.3 is not applicable.

I further find that Standard 2.4.1.1 B.1, which calls for the completion of a wildlife and plant habitat assessment, has been satisfied by the proposal, as Plaintiff has supplied the required assessment to the Commission.

This standard also sets forth the additional requirement, that the development be planned to minimize impacts to wildlife and plant habitat. In this regard, the Commission rejected Plaintiffs plan and proposed an alternative configuration which would allow plaintiff to extract sand and gravel from 25 acres of the 70 acre locus (35% of his property). I find that such requirement as applied to this case would appear to constitute a taking and may not be a condition. The foregoing notwithstanding, I further find that Plaintiff's proposal which includes phasing, restoration, and the creation of buffer zones around wetlands resources and along the perimeter of the site, balances the need to minimize detrimental impacts to habitat while allowing Plaintiff to effectively mine his property in the appropriate locations and complies with this Standard.

Similarly, Standard 6.1.1 requires developments in the Capewide Open Space/Greenbelt network to cluster development away from sensitive resources and maintain a continuous wildlife corridor. I find this standard incongruous with the proposed project, especially in light of the fact that the Commission proposed that the Plaintiff "cluster" his mining activity in areas that may not be productive. While such requirement is an obvious incursion on Plaintiff's property rights, I find that by phasing the proposal and establishing buffer zones, a significant portion of Plaintiff's property will remain as undisturbed open space throughout the duration of the mining activity and more than meets any legal obligation of Plaintiff.

Standard 6.1.5 requires developments to protect significant natural and fragile areas and land forms. I find, that the proposed buffer zones around these wetland resources is sufficient to protect against adverse impacts. Regarding the protection of significant land

forms, I again find this requirement irreconcilable with the use Plaintiff has proposed for his property, and must be excluded.

Regarding the aforementioned Standards designed to protect habitat and wildlife, I find that the Commission's approval may be conditioned on regular inspections of the buffer zones to insure compliance.

I find that while such requirement certainly falls into the taking category, Plaintiff has met Standard 6.1.4, requiring the dedication of 40% of the lot area excluding wetlands as permanent open space. Plaintiff proposes to mine approximately 50% of locus, and naturally, he proposes to mine the 50% which he believes will be the most productive sources of sand and gravel. I find the Commission is unreasonable in dictating which areas Plaintiff must leave as open space, without offering compensation for said areas. Furthermore, I find no Legislative authority giving the Commission jurisdiction to determine which 40% a DRI applicant must set aside. I also note that this Standard applies to "commercial" developments and suggest that sand and gravel mining is not such a development.

Finally, I find that the Standards falling under Section 4 of the RPP regarding transportation and capital facilities are not applicable to the proposed project for the following reason.

Standard 4.1.1.1 requires that proposed developments shall not degrade existing levels of service of surrounding roads. Conflicting testimony was presented regarding the potential of such impacts, but in the worst case scenario which I do not accept, the proposal would have a marginal effect on only one intersection. I find that credible evidence was presented to show that the worst case scenario would not or most likely not be realized, and thus I find that the proposed development satisfies said Standard. As a result of this finding, the approval may not be conditioned on the Commission's earlier requirement pursuant to Standards 4.1.1.2, 4.1.1.3, 4.1.2.1 and 4.3.1.1 that Plaintiff donate a $40,000 "fair share contribution" for traffic impact

mitigation and $12,400 to fund alternative transportation to offset traffic volumes.

Approval of the DRI may be conditioned on compliance with Sections 2.1.1.2 A.2 and 4.2.2.3, and periodic inspections of the required buffer zones. No further conditions may be added to such approval.

Judgement Accordingly.

/s/

Robert V. Cauchon
Chief Justice

Dated:June 14, 1996

APPENDIX B

Supreme Judicial Court of Massachusetts,
Suffolk.

Francis E. DADDARIO
v.
CAPE COD COMMISSION.

Submitted March 4, 1997.
Decided July 11, 1997.

Property owner filed an action seeking judicial review and declaratory relief from the denial of a development permit for property on Cape Cod. The Superior Court, Land Court Department, Robert V. Cauchon, J., found that the Cape Cod Commission's actions amounted to a "taking" under the State and Federal Constitutions. Commission sought direct appellate review. The Supreme Judicial Court, Lynch, J., held that: (1) ripeness principles barred the owner's taking claim challenging the Commission's disapproval of a development permit, absent a final determination on the nature and extent of development that the Commission would permit on the property, and (2) the decision did not amount to a "regulatory taking."

Judgment vacated and matter remanded.

Eric W. Wodlinger, Boston (H. Hamilton Hackney III, with him), for defendant.

V. Douglas Errico, Braintree (Thomas O. Moriarty, with him), for plaintiff.

The following submitted briefs for amici curiae:

Paul W. Edmondson, Elizabeth S. Merritt, & Laura Nelson, Washington, DC, & Jerold S. Kayden, for National Trust for Historic Preservation in the United States.

Jeffrey M. Bernstein & Kenneth L. Kimmell, Boston, for Association for the Preservation of Cape Cod, Inc., & others.

Scott Harsbarger, Attorney General, & Madelyn Morris, Assistant Attorney General, for the Commonwealth.

R. Jeffrey Lyman, Boston, for Massachusetts Audubon Society & another.

Before WILKINS, C.J., and ABRAMS, LYNCH and FRIED, JJ.

LYNCH, Judge.

The plaintiff filed an action in the Land Court against the Cape Cod Commission (commission), pursuant to St.1989, c. 716, An Act establishing the Cape Cod Commission (act), seeking judicial review and declaratory relief from the denial of a development permit. The judge ruled that the commission's decision constituted a taking under the State and Federal Constitutions, and pursuant to § 13 Eric W. Wodlinger, Boston (H. Hamilton Hackney III, with him), for defendant.

V. Douglas Errico, Braintree (Thomas O. Moriarty, with him), for plaintiff.

The following submitted briefs for amici curiae:

Paul W. Edmondson, Elizabeth S. Merritt, & Laura Nelson, Washington, DC, & Jerold S. Kayden, for National Trust for Historic Preservation in the United States.

Jeffrey M. Bernstein & Kenneth L. Kimmell, Boston, for Association for the Preservation of Cape Cod, Inc., & others.

Scott Harsbarger, Attorney General, & Madelyn Morris, Assistant Attorney General, for the Commonwealth.

R. Jeffrey Lyman, Boston, for Massachusetts Audubon Society & another.

Before WILKINS, C.J., and ABRAMS, LYNCH and FRIED, JJ.

LYNCH, Judge.

The plaintiff filed an action in the Land Court against the Cape Cod Commission (commission), pursuant to St.1989, c. 716, An Act establishing the Cape Cod Commission (act), seeking judicial review and declaratory relief from the denial of a development permit. The judge ruled that the commission's decision constituted a taking under the State and Federal Constitutions, and pursuant to § 13(*f*) of the act, ordered the commission to approve the plaintiff's development. We granted the commission's application for direct appellate review, and now vacate the decision of the Land Court.

The judge found the following facts. The commission was created to coordinate regional planning and land use development on Cape Cod. To accomplish this objective, the commission drafted a regional policy plan which seeks to balance economic development and natural resource conservation. Developments of regional impact, including any outdoor commercial space greater than 40,000 square feet, are reviewed by the commission to determine whether they conform with the regional plan. § 12(*c*)(6) of the act. The commission may approve, or approve with conditions, a proposed development if (1) the probable benefit from the project outweighs the probable detriment, (2) the project is consistent with the regional policy plan, and (3) the project is consistent with municipal development by-laws. § 13 (*d*) of the act. If the commission disapproves, the project may not go forward. However, any party aggrieved by the commission's decision may seek judicial review in the Superior Court or the Land Court. § 17(*b*) of the act.

In 1964, the plaintiff purchased seventy acres of land (parcel) in Falmouth. The parcel is located in an AGA (agricultural) zoning district. Pursuant to art. XXIX of the Falmouth zoning by-laws (by-laws), earth removal is permitted in an AGA zoning district on the issuance of a special permit.[1]

In February, 1994, the plaintiff applied to the zoning board of appeals of Falmouth (board) for a special permit. The proposed project called for the extraction of sand and gravel in seven phases, each approximately five acres. Each phase was to be reclaimed through grading, loaming, and seeding before work commenced on the next. The project qualified as a development of regional impact and the board referred it to the commission for review.[2]

In June, 1994, the plaintiff submitted an application with the requisite materials. After two public hearings, the commission denied the plaintiff's application because it did not meet the commission's standards for protection of natural resources, preservation of open space, and acceptable burdens on community infrastructure. The commission concluded that the proposed project "would not enhance or protect open space on the site in a way that respects the importance of sensitive natural resources of Cape Cod." The plaintiff appealed from the commission's decision to the Land Court.

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[1] The by-laws require that earth removal sites have a border buffer strip of at least one hundred feet from the side line of any road and two hundred feet from all abutting property lines, unless written consent of the abutting property owner has been received by the zoning board of appeals of Falmouth. The by-laws also require reclamation by grading, reloaming, and seeding.

[2] Once a municipal agency refers a proposed development to the commission or receives notice of the commission's intent to review a project, the municipal agency must suspend its review. § 12(*h*) of the act.

The judge ruled that the commission's actions constituted a regulatory taking. He found that, prior to the commission's action, the parcel had "substantial value as a sand and gravel operation and that thereafter it had little or none." The judge indicated:

> "I do not find it necessary herein to determine precise before and after values, as the remedy provided for by the act is not money damages but, most likely in an effort to avoid such payments, grant of the requested relief. I do find that even though [the parcel] may still have substantial value for other development, the magnitude of the financial loss, as supported by the evidence, and the loss of an owner's right to use his property as he wishes, certainly demonstrate that the action of the [c]ommission has crossed the line from a noncompensable 'mere diminution' to a compensable taking."

The judge ordered the commission to approve the plaintiff's plan subject to certain conditions.

The commission appealed arguing that the court erred in ruling that the commission's disapproval of the project constituted a regulatory taking. The commission further argued that the decision entered in the Land Court was erroneous in that the judge: (a) ordered the commission to approve the project and established the only conditions to be attached to the approval; (b) failed to provide adequate findings of fact as required by Mass. R. Civ. P. 52(a), as amended, 423 Mass. 1402 (1996); (c) applied the wrong standard of review to the commission's decision; and (d) failed to find that there was sufficient evidence at trial to demonstrate that the commission's decision was not arbitrary or capricious. Because we decide that the judge erroneously concluded that the commission's action constituted a taking, we need not reach these additional arguments.

Discussion. In deciding this case we consider both the Federal ripeness doctrine and regulatory taking principles and determine that both lead to the conclusion that the result below cannot be affirmed.

[1] a. *Ripeness doctrine.* The Supreme Court has consistently declined to consider unripe takings claims. See *MacDonald, Sommer & Frates v. County of Yolo,* 477 U.S. 340, 351, 106 S.Ct. 2561, 2567, 91 L.Ed.2d 285 (1986); *Williamson County Regional Planning Comm'n v. Hamilton Bank,* 473 U.S. 172, 186, 105 S.Ct. 3108, 3116, 87 L.Ed.2d 126 (1985); *Agins v. Tiburon,* 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980). See also *Wilson v. Commonwealth,* 413 Mass. 352, 356, 597 N.E.2d 43 (1992). The ripeness doctrine provides that "a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Williamson County Regional Planning Comm'n v. Hamilton Bank, supra* at 186, 105 S.Ct. at 3116.

[2] The act's provisions for judicial review of the commission decisions may be in conflict with the ripeness doctrine as it applies to takings claims. Section 13 (*f*) of the act provides:

> "Notwithstanding the provisions of subsection (*d*) of section thirteen, the commission shall approve or approve with conditions a development of regional impact where an applicant demonstrates that to disapprove the development of regional impact would constitute a taking of property in violation of the Massachusetts and United States Constitutions; provided, however, that no reasonably foreseeable danger to the public health or safety will arise from such approval or approval with conditions."

Section 17(*b*) of the act further provides: "Any party aggrieved by a commission decision on a development of regional impact may appeal the commission's decision to the Barnstable county superior court or the land court." There is no requirement that the applicant must submit alternative plans or demonstrate that a final determination has been reached on the nature and extent of the permitted development before appealing from a decision. Thus, the statute can be interpreted to provide for judicial review of individual decisions to determine whether the commission's disapproval constitutes a taking. See *Keenan, petitioner,* 310 Mass. 166, 179, 37 N.E.2d 516 (1941) (General Court has power to modify, enlarge, diminish, or transfer jurisdiction). See also Part II, c. 1, § 1, art. 3, of the Massachusetts Constitution.

However, "[i]t follows from the nature of a regulatory takings claim that an essential prerequisite to its assertion is a final and authoritative determination of the type and intensity of development legally permitted on the subject property. A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." *MacDonald, Sommer & Frates v. County of Yolo, supra* at 348, 106 S.Ct. at 2566. Thus, property owners cannot assert a taking claim under § 17(*b*) absent a final determination on the nature and extent of development that the commission will permit.

b. *Regulatory taking principles.* The judge found that, prior to the commission's action, the plaintiff's property had substantial value as a sand and gravel operation and thereafter it had none, although the property may still have substantial value for other development. The plaintiff argues that this was proper because his proposal was the only economically viable alternative for mining operations and thus the

commission's denial of it was a taking.[3] We disagree. We conclude that the record does not support a finding that a taking has occurred.

"When a regulatory taking involves neither a physical invasion nor a complete deprivation of use, as in the case here, Federal law has established several interrelated factors which are to be considered in determining whether a compensable taking has occurred: '(1) "the economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the governmental action." ' " *Leonard v. Brimfield,* 423 Mass. 152, 154, 666 N.E.2d 1300, cert. denied, --- U.S. ----, 117 S.Ct. 582, 136 L.Ed.2d 513 (1996), quoting *Connolly v. Pension Benefit Guar. Corp.,* 475 U.S. 211, 225, 106 S.Ct. 1018, 1026, 89 L.Ed.2d 166 (1986). See *Lopes v. Peabody,* 417 Mass. 299, 304, 629 N.E.2d 1312 (1994). See also *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1015, 112 S.Ct. 2886, 2893, 120 L.Ed.2d 798 (1992), and cases cited. "[T]here may ... be a regulatory taking based, in part, on the regulation's economic impact on the property as a whole and the extent to which the regulation has interfered with a property owner's distinct investment-based expectations." *Steinbergh v. Cambridge,* 413 Mass. 736, 742, 604 N.E.2d 1269 (1992), cert. denied, 508 U.S. 909, 113 S.Ct. 2338, 124 L.Ed.2d 249 (1993), citing *Penn Cent. Transp. Co. v. New York City,* 438 U.S. 104, 124-125, 130-131, 98 S.Ct. 2646, 2659-2660, 2662-2663, 57 L.Ed.2d 631 (1978).

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[3] The plaintiff's argument that art. 10 of the Massachusetts Declaration of Rights grants him greater rights than the United States Constitution does not rise to the level of appellate argument. See *Greater Media, Inc. v. Department of Pub. Utils.,* 415 Mass. 409, 418, 614 N.E.2d 632 (1993) (four-sentence discussion which merely cites statute does not rise to level of proper appellate argument).

[3] " 'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." *Moskow v. Commissioner of Envtl. Mgt.*, 384 Mass. 530, 533, 427 N.E.2d 750 (1981), quoting *Penn Cent. Transp. Co. v. New York City, supra* at 130-131, 98 S.Ct. at 2662. Rather, the proper focus is on the character of the action and the nature of the interference with the rights in the property as a whole. See *Steinbergh v. Cambridge, supra* at 742, 604 N.E.2d 1269; *Moskow v. Commissioner of Envtl. Mgt., supra.* "When the claim is that government conduct, not amounting to a permanent physical occupation or confiscation of property, involves a regulatory taking, the analysis is peculiarly fact dependent, involving 'essentially ad hoc, factual inquiries.' " *Steinbergh v. Cambridge, supra* at 741, 604 N.E.2d 1269, quoting *Penn Cent. Transp. Co. v. New York City, supra* at 124, 98 S.Ct. at 2659. Thus restrictions on a landowner's right to extract minerals from his property is not necessarily a regulatory taking when the property as a whole retains substantial value. See *Keystone Bituminous Coal Ass'n v. DeBenedictis,* 480 U.S. 470, 496-497, 107 S.Ct. 1232, 1247-1248, 94 L.Ed.2d 472 (1987); *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 296-297, 101 S.Ct. 2352, 2370-2371, 69 L.Ed.2d 1 (1981).

[4] This court has repeatedly recognized that government regulations "may deprive an owner of a beneficial property use--even the most beneficial such use--without rendering the regulation an unconstitutional taking." *Moskow v. Commissioner of Envtl. Mgt., supra,* quoting *Lovequist v. Conservation Comm'n of Dennis,* 379 Mass. 7, 19, 393 N.E.2d 858 (1979). See *Leonard v. Brimfield, supra* at 156, 666 N.E.2d 1300. "Land use planning is not an all-or-nothing proposition. A government entity is not required to permit a landowner to develop property to [the] full extent he might desire or be charged with an

unconstitutional taking of the property." *MacDonald, Sommer & Frates v. County of Yolo,* 477 U.S. 340, 347, 106 S.Ct. 2561, 2565, 91 L.Ed.2d 285 (1986). That an alternative, permissible use might be less profitable is not determinative. See *Penn Cent. Transp. Co. v. New York City, supra* at 124, 98 S.Ct. at 2659.

[5] We conclude that the record before us does not support the ruling that a regulatory taking took place. The commission denied the plaintiff's proposal to mine thirty-two acres. This denial did not preclude less extensive sand and gravel operations. See *Keystone Bituminous Coal Ass'n v. DeBenedictis, supra* (no taking where regulation only restricted amount of coal which could be extracted). In fact, the commission's staff proposed a plan which would have permitted sand and gravel extraction on twenty-five acres, but the plaintiff declined to consider this alternative or modify his proposal. While not conclusive, the staff's plan demonstrated a willingness to permit less extensive mining proposals.[4] The denial of a particular plan cannot be equated with a refusal to permit any development. See *MacDonald, Sommer & Frates v. County of Yolo, supra* at 347, 106 S.Ct. at 2565.

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[4] It is possible that the plaintiff's proposal for sand and gravel operation is the only economically viable plan for the site, in which case its denial might constitute a regulatory taking. Because there has been no final determination regarding the nature and extent of the regulation in this case, "it is impossible to tell whether the land retain[s] any reasonable beneficial use or whether [existing] expectation interests [have] been destroyed." *MacDonald, Sommer & Frates v. County of Yolo,* 477 U.S. 340, 349, 106 S.Ct. 2561, 2566, 91 L.Ed.2d 285 (1986), quoting *Williamson County Regional Planning Comm'n v. Hamilton Bank,* 473 U.S. 172, 189-190 n. 11, 105 S.Ct. 3108, 3118 n. 11, 87 L.Ed.2d 126 (1985). However, we need not speculate on this issue where there is clear evidence that the plaintiff owns more than a mineral estate and property has other valuable uses. See *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.,* 452 U.S. 264, 296-297, 101 S.Ct. 2352, 2370-2371, 69 L.Ed.2d 1 (1981).

[6] Even if less extensive mining operations were not feasible, the record shows that the property has substantial value for alternative uses. The property is zoned in an agricultural district, which under the Falmouth zoning by-laws, allows for community service, agricultural, and residential uses.[5] There is no evidence in the record that the commission would oppose a residential development on the plaintiff's property. Indeed, the plaintiff contemplated residential use after removing the sand and gravel.

"Since loss of economic use and value is the issue in this regulatory taking case, it is not possible, absent a valid determination in the record of the 'after imposition' value, to know if a taking occurred...." *Florida Rock Indus., Inc. v. United States,* 18 F.3d 1560, 1579 (Fed.Cir.1994), cert. denied, 513 U.S. 1109, 115 S.Ct. 898, 130 L.Ed.2d 783 (1995). Because it is possible that less extensive sand and gravel operations may be approved and that the property has substantial economic value for other uses, we conclude that the findings of the judge do not support his conclusion that there was a taking.

The judgment is vacated and the matter is remanded to the Land Court for further proceedings consistent with this opinion.

So ordered.

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[5] There was ample evidence in the record to show that the property had substantial value even without a permit to remove sand and gravel.

APPENDIX C

Appeals Court of Massachusetts,
Suffolk.
Francis E. DADDARIO
v.
CAPE COD COMMISSION.
No. 00-P-1851.

Argued Sept. 17, 2002.
Decided Dec. 18, 2002.
Further Appellate Review Denied Feb. 27, 2003.

Property owner filed action seeking judicial review and declaratory relief from denial of development permit to mine sand and gravel on 32 acres of property. The Superior Court, Land Court Department, Robert V. Cauchon, J., found that commission's actions amounted to a "taking" under state and federal constitutions. Commission sought direct appellate review. The Supreme Judicial Court, 425 Mass. 411, 681 N.E.2d 833, Lynch, J., vacated judgment and remanded. On remand, the Superior Court, Land Court Department, Peter W. Kilborn, J., declined further consideration of takings claim, and granted commission's renewed motion to dismiss. Owner appealed. The Appeals Court, Kafker, J., held that: (1) ripeness principles barred property owner's taking claim challenging commission's disapproval of development permit; (2) allegations by property owner that language of act was void for vagueness did not state claim for violation of owners' due process; and (3) owner was not denied equal protection of laws.

Affirmed.

Thomas O. Moriarty, Braintree, for the plaintiff.

H. Hamilton Hackney, III (Eric W. Wodlinger with him) for the defendant.

Present: CYPHER, McHUGH, & KAFKER, JJ.

KAFKER, J. The plaintiff, Francis E. Daddario, sought a permit to mine sand and gravel on thirty-two acres of a seventy acre parcel (locus) on Cape Cod. The Cape Cod Commission (commission), established by St.1989, c. 716 (Act),[1] and charged by the Legislature with regulating "developments of regional impact" (DRIs)[2] on the Cape, denied the permit. Next, a judge of the Land Court ruled that the commission's decision constituted a taking, but did not address the plaintiff's other claims. The Supreme Judicial Court reversed the takings decision, relying on "both the Federal ripeness doctrine and regulatory taking principles," and remanded the case to the Land Court for further proceedings. *Daddario v. Cape Cod Commn.*, 425 Mass. 411, 681 N.E.2d 833, cert. denied, 522 U.S. 1036, 118 S.Ct. 644, 139 L.Ed.2d 621 (1997). On remand, another judge of the Land Court (the first judge had retired), decided, based on the Supreme Judicial Court's analysis in *Daddario,* to decline any further consideration of the takings claim. The judge also granted the commission's renewed motion to dismiss, under Mass.R.Civ.P. 12(b)(6), 365 Mass. 755 (1974), the plaintiff's claims that the Act was void for vagueness and, as applied, violated the plaintiff's rights to equal protection of the laws.[3] The

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[1] Chapter 2 of St.1990 amended § § 18 and 21 of the Act, which have no bearing on the matter before us.

[2] A DRI is defined by statute to be a "development which, because of its magnitude or the magnitude of its impact on the natural or built environment, is likely to present development issues significant to or affecting more than one municipality." § 2(*h*) of the Act. There is no question that the development at issue meets that definition.

[3] In an earlier decision by the Land Court judge after remand, the plaintiff's claim that the commission's decision was arbitrary and capricious, and that the permit denial violated the Act, was rejected based on the record developed at the original trial. That decision has not been appealed.

plaintiff appeals the Land Court's decision on remand. We affirm.

Background. 1. *The Act and the regional policy plan.* The Act recognizes the "unique natural, coastal, scientific, historical, cultural, architectural, archaeological, [and] recreational values" of the Cape. § 1(*a*) of the Act. It declares that these values are being "threatened and may be irreparably damaged by uncoordinated or inappropriate uses of the region's land and other resources." *Ibid.*

The purpose of the Act is to protect the Cape's unique natural and man-made environment and provide for "balanced and sustainable economic development." § 1 of the Act. The Act establishes a process for commission review of DRIs, along with standards and criteria for the review based on factors including:

> "the impact of the development on the environment and natural resources ... [and on] existing capital facilities, ... the physical size of the development ... the amount of pedestrian and vehicular traffic [generated by] the development ... the anticipated number of new residents or employees generated ... [and] the importance of the development to economic development in the region."

§ 12(*b*) of the Act.

The commission is directed to approve DRIs if, inter alia:

> "the probable benefit from the proposed development is greater than the probable detriment; [and] ... the proposed development is consistent with the regional policy plan and ... the proposed development is consistent with municipal development by-laws."

§ 13(*d*) of the Act.

Notwithstanding these requirements, the commission is required to "approve or approve with conditions a development of regional impact where an applicant demonstrates that to disapprove the development of regional impact would constitute a taking of property in violation of the Massachusetts and United States Constitutions; provided, however, that no reasonably foreseeable danger to the public health or safety will arise from such approval or approval with conditions." § 13(*f*) of the Act.

The Act requires the commission to prepare a regional policy plan to "reflect and reinforce" the objectives set out in the statute, § 7(*a*) of the Act, and establishes a public process for its formulation. The plan developed by the commission includes "minimum performance standards" for applicants proposing DRIs, including requirements that developments be designed to minimize impacts on wildlife, plant habitat, and the alteration of natural topography.[4] Commercial developments with regional impacts are required permanently to maintain forty percent of the lot being developed, excluding wetlands, as open space.

2. *Daddario's proposal.* The plaintiff owns seventy acres of land off Thomas Landers Road in Falmouth. The locus is undeveloped forested land with wetlands and a vernal pool, and is zoned for agricultural purposes. It abuts existing gravel operations, a

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[4] See, e.g., minimum performance standard 2.4.1.1B.1 of the regional policy plan ("[a]pplications for [DRIs] that ... alter ... areas [of general wildlife and plant habitat] shall contain a wildlife and plant habitat assessment. Such assessments shall ... be a guide for the layout of the development. Developments shall be planned to minimize impacts to wildlife and plant habitat"); minimum performance standard 2.4.1.1B.2 ("[c]learing of vegetation and alteration of natural topography shall be minimized, with appropriate vegetation planted as needed to enhance or restore wildlife habitat").

residential subdivision, a great pond, and town- owned conservation property. It is within the zone of contribution to the Mares Pond public supply well and numerous private wells.

The plaintiff's proposal calls for thirty-two acres of sand and gravel extraction in seven sequential phases, each involving five acres or less. The proposal includes a two hundred foot buffer zone around the perimeter of the development. At the completion of the mining, the plaintiff proposes to develop the property for residential use. The plaintiff states the project would be beneficial for the area because of its potential to create jobs in the local community, increase the local availability of reasonably priced gravel, decrease the amount of vehicular traffic on the Cape caused by bringing in gravel, and increase town tax revenues while comporting with similar activity in the area.

The plaintiff rejected an alternative proposal by the commission that would have allowed mining on twenty-five acres. *Daddario,* 425 Mass. at 417, 681 N.E.2d 833.

3. *The commission's action.* The commission determined that "[m]ining the site would remove approximately [thirty-two] acres of mature, natural plant and wildlife habitat that could not be replaced through the proposed reclamation of the site." The commission also found that the project design failed to minimize (1) the impact on wildlife and plant habitat, and (2) alteration of natural topography, in violation of minimum performance standards 2.4.1.1B.1 and 2.4.1.1B.2 of the regional policy plan. The project also reduced open space and the "applicant refused to agree to any permanent restriction of open space in violation of [minimum performance standard] 6.1.5."

The commission further found that the proposal presented risks of groundwater contamination by bringing the land surface to within ten feet of the

groundwater table. The commission also identified the soils in the locus as "transmissive."

The commission discounted the benefits claimed by the plaintiff, finding that the "project would not contribute to a balanced economy consistent with Cape Cod's environmental strengths and constraints." It (1) described mining as a "consumptive activity," (2) remarked on the "widespread availability" of sand and gravel on the Cape, and (3) found that the project had not been designed to minimize environmental impacts.

The commission concluded that the "probable benefit does not outweigh the project's probable detriment," and that the plaintiff had not met the minimum performance standards of the regional policy plan.

Discussion. 1. *The takings claim.* Over the plaintiff's objection, the Land Court judge on remand declined to further consider the takings claim because he concluded that the Supreme Judicial Court in *Daddario* had determined that the takings claim was not ripe. In a novel interpretation of *Daddario,* the plaintiff argues that the Land Court erred because the Supreme Judicial Court remanded the matter for a further determination whether his takings claim was ripe for adjudication based on additional analysis by the Land Court of the economic value of the locus. The plaintiff has misunderstood the essential point of the Supreme Judicial Court's decision, which is that, without further interaction between the commission and the plaintiff, the extent of the regulation and the resulting value of the locus cannot be determined, and therefore any takings claim is premature.

The court in *Daddario* emphasized that a regulatory takings claim "is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Daddario,* 425 Mass. at 414, 681 N.E.2d 833, quoting

from *Williamson County Regional Planning Commn. v. Hamilton Bank*, 473 U.S. 172, 186, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985). This involves "a final determination on the nature and extent of development that the commission will permit." *Daddario*, 425 Mass. at 415, 681 N.E.2d 833. The rationale is that a "court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." *Ibid.*, quoting from *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 348, 106 S.Ct. 2561, 91 L.Ed.2d 285 (1986). Compare *Palazzolo v. Rhode Island*, 533 U.S. 606, 620, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001) (where "permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened").

In the instant case, the plaintiff has submitted a single permit application to the commission in which he proposed to mine thirty-two acres of the property. In response, the "commission's staff proposed a plan which would have permitted sand and gravel extraction on twenty-five acres [in different sites with less environmental impact], but the plaintiff declined to consider this alternative or modify his proposal." *Daddario*, 425 Mass. at 417, 681 N.E.2d 833. The plaintiff contends that this proposal would have required him to excavate in violation of local zoning by-laws and therefore it was not feasible. Without further interaction between the plaintiff and the commission, however, it is not possible to determine whether any economically viable sand and gravel mining operation acceptable to the commission could be identified.[5] The same is true

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[5] See *Daddario*, 425 Mass. at 417, 681 N.E.2d 833 ("[t]he denial of a particular plan cannot be equated with a refusal to permit any development"). See also *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. at 351, 106 S.Ct. 2561 (developer who submitted one large subdivision proposal and was rejected had not received a final decision about how regulations would be applied to property); *Palazzolo v. Rhode Island*, 533 U.S. at 620, 121 S.Ct. 2448 (case that is ripe is "quite unlike those ... which arose when an owner

for other uses, such as a residential housing development, proposed by the plaintiff for construction upon completion of sand and gravel excavation from the land.

[2] The plaintiff's contention that further interaction with the commission would have been futile was not addressed directly by the court in *Daddario,* but his argument is inconsistent with the court's ripeness analysis. Moreover, while there is a narrow futility exception to the requirement for a final decision before a takings claim is ripe, "[t]o come within the exception, a sort of inevitability is required: the prospect of refusal must be certain (or nearly so)." *Gilbert v. Cambridge,* 932 F.2d 51, 61 (1st Cir.), cert. denied, 502 U.S. 866, 112 S.Ct. 192, 116 L.Ed.2d 153 (1991). See *Wilson v. Commonwealth,* 31 Mass.App.Ct. 757, 766, 583 N.E.2d 894, *S.C.,* 413 Mass. 352, 597 N.E.2d 43 (1992). The record does not reflect that further interaction between the plaintiff and the commission would be futile. Rather, such interaction was necessary to test and clarify the extent of development on the locus the commission would find acceptable.[6]

The Land Court judge on remand, therefore, correctly declined to revisit the takings claim.

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challenged a land-use authority's denial of a substantial project, leaving doubt whether a more modest submission or an application for a variance would be accepted").

[6] The Supreme Judicial Court did not prejudge the outcome of that interaction. For example, the court did not rule out the possibility that further interaction between the plaintiff and the commission would demonstrate that the plaintiff's proposal was the only economically viable one for the site. *Daddario, supra* at 417 n. 4, 681 N.E.2d 833. The court's skepticism, however, that any regulatory taking could eventually be established is readily apparent from the rest of the opinion, particularly *id.* at 418 n. 5, 681 N.E.2d 833.

2. *Void for vagueness.* The plaintiff contends that the language of § 13(*d*)(1) of the Act is void for vagueness because it requires the commission to compare probable benefits to probable detriments and if, in the commission's opinion, the probable benefits do not outweigh the probable detriments, it can deny the permit. He claims that the denial of the permit based on § 13(*d*)(1) violates substantive due process principles.

For the plaintiff to succeed on a void for vagueness argument, the statute must be "so vague that 'men of common intelligence must necessarily guess at its meaning and differ as to its application,' " thereby allowing " 'untrammeled [administrative] discretion' ... and arbitrary and capricious decisions in violation of the due process clause of the Fourteenth Amendment ... and of art. 10 of the Massachusetts Declaration of Rights." *Board of Appeals of Hanover v. Housing Appeals Comm.*, 363 Mass. 339, 363-364, 294 N.E.2d 393 (1973) (citations omitted). In making this determination we review the statute as a whole, *id.* at 364, 294 N.E.2d 393, as well as the administrative actions further defining the statute. See *Brookline v. Commissioner of the Dept. of Envtl. Quality Engr.*, 387 Mass. 372, 379, 439 N.E.2d 792 (1982); *Massachusetts Fedn. of Teachers, AFT, AFL-CIO v. Board of Educ.*, 436 Mass. 763, 780, 767 N.E.2d 549 (2002). As the Act regulates business activities and does not concern either criminal activity or First Amendment freedoms, "we limit our vagueness analysis to whether [the statute ...] is unconstitutionally vague as applied in [the particular] case." *Gurry v. Board of Pub. Accountancy*, 394 Mass. 118, 127, 474 N.E.2d 1085 (1985), quoting from *Caswell v. Licensing Commn. for Brockton*, 387 Mass. 864, 873, 444 N.E.2d 922 (1983).

We have no difficulty concluding that the plaintiff's argument that the Act as applied is void for vagueness and, therefore, a violation of substantive due process is without merit. As the Massachusetts courts and the First Circuit have emphasized, "[d]ue process ...

claims are very seldom the means to seek review of the actions of land use agencies," *Wyman v. Zoning Bd. of Appeals of Grafton*, 47 Mass.App.Ct. 635, 636, 715 N.E.2d 459 (1999), absent "truly horrendous situations." *Freeman v. Planning Bd. of W. Boylston*, 419 Mass. 548, 560, 646 N.E.2d 139, cert. denied, 516 U.S. 931, 116 S.Ct. 337, 133 L.Ed.2d 235 (1995), citing *Nestor Colon Medina & Sucesores, Inc. v. Custodio*, 964 F.2d 32, 45 (1st Cir.1992). Here we have no allegations even approaching such an abuse of governmental power.

The statute has a well-defined and rational basis: to DRIs and requires it to develop even more detailed plans and guidelines in the regional policy plan. Those criteria provide a framework for the "probable benefits and detriments" analysis in question. In carrying out its statutory responsibilities, the commission established minimum performance standards. These standards are directly related to the statutory purposes.

In its decision, the commission applied the statutory tests and the regional policy plan's minimum performance standards and found that the plaintiff had not satisfied either.[7] Although the plaintiff's complaint contains conclusory statements that the probable benefits of his proposal outweigh any alleged or perceived detriments, it does not identify what those benefits are or how they outweigh the adverse environmental effects the commission considered when it applied the statutory criteria. The complaint claims, in a similarly conclusory fashion, that the plaintiff has satisfied the minimum performance standards. Far more is required of a plaintiff challenging the constitutionality of a statute on vagueness and

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[7] For the purpose of analyzing the rule 12(b)(6) motion on the constitutional claims, we take the plaintiff's factual allegations to be true, see *Wyman v. Zoning Bd. of Appeals of Grafton*, 47 Mass.App.Ct. at 636, 715 N.E.2d 459, and do not rely on the Land Court's fact-finding in its earlier decision on the statutory claim (see note 3, *supra*).

substantive due process grounds on the basis that he was denied a land use permit. See generally *Wyman v. Zoning Bd. of Appeals of Grafton*, 47 Mass.App.Ct. at 636-637, 715 N.E.2d 459; *Chiplin Enterprises, Inc. v. Lebanon*, 712 F.2d 1524, 1527-1528 (1st Cir.1983); *Amsden v. Moran*, 904 F.2d 748, 757 (1st Cir.1990) ("[c]harges that substantive due process was denied cannot rest on conclusory allegations or rhetoric alone").

Here we have well-defined objectives and standards set out in the Act and regional policy plan and an application of those standards by the commission. This application is challenged in a complaint that is particularly meager regarding the benefits and detriments analysis that is the subject of the void for vagueness challenge. Moreover, the project, due to its nature and size-- the mining of thirty-two acres of open space with valuable habitat--raises core statutory concerns that are assigned to the commission for review and resolution. The Land Court properly dismissed the void for vagueness, substantive due process challenge to the statute.[8]

3. *Equal protection.* The plaintiff also contends that he was denied equal protection of the laws in violation of the Massachusetts and United States Constitutions. The courts of this Commonwealth and the First Circuit have emphasized that the denial of a land use permit does not rise to a constitutional violation absent special considerations. "Liability in the instant type of equal protection case should depend on proof that (1) the person, compared with others similarly situated, was selectively treated; and (2) that such selective treatment was based on impermissible

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[8] As it is clear that the statute as applied is not impermissibly vague, and the commission has not engaged in arbitrary and capricious decision-making, see note 3, *supra*, we need not belabor the various substantive due process tests, or whether the plaintiff has alleged a sufficient property interest for these purposes. See *Pittsley v. Warish*, 927 F.2d 3, 6 (1st Cir.1991).

considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person." *Rubinovitz v. Rogato,* 60 F.3d 906, 909-910 (1st Cir.1995) (citations omitted). As this court has stated, the "allegation that others similarly situated obtained permits is not, without more, a denial of equal protection of the laws. Allegations of clear and intentional discrimination are required." *Rosenfeld v. Board of Health of Chilmark,* 27 Mass.App.Ct. 621, 628-629, 541 N.E.2d 375 (1989). See *Snowden v. Hughes,* 321 U.S. 1, 8, 64 S.Ct. 397, 88 L.Ed. 497 (1944) ("[t]he unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination"). Finally, the liberal notice pleading requirements embodied in Mass.R.Civ.P. 8(a), 365 Mass. 749 (1974), see *Rae v. Air-Speed, Inc.,* 386 Mass. 187, 191, 435 N.E.2d 628 (1982), do not countenance pleadings composed solely of conclusory labels. See, e.g., *Romero v. Otero,* 678 F.Supp. 1535, 1537 (D.N.M.1987) (allowing a motion to dismiss, inter alia, on an equal protection claim, the court stated, "While a detailed listing of facts is not required, general legal conclusions will seldom satisfy the pleader's duty to state the grounds upon which the claim rests. Conclusory allegations are not sufficient to withstand a motion to dismiss when no facts are alleged to support the conclusion").

The plaintiff does not allege that impermissible considerations such as race, religion, or the punishment of the exercise of constitutional rights entered into the commission's decision. Contrast *Yick Wo v. Hopkins,* 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886). Nor does he allege intentional discrimination for any other reason. The original complaint did not even reference other sand and gravel sites that had been granted permits by the commission, although at oral argument on the motion to

dismiss, the plaintiff alleged, and counsel for the commission agreed for the purpose of the motion, that "at least four other, similar mining operations were approved by the commission." Nothing more was alleged. At most we have a general allegation, without any specifics, that others similarly situated were granted permits. This is not enough to support an equal protection claim, even on a motion to dismiss.[9]

Judgment affirmed.

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[9] The plaintiff relies heavily on the Supreme Court's abbreviated decision in *Village of Willowbrook v. Olech*, 528 U.S. 562, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000). In that case, in which the complaint was apparently replete with allegations of improper considerations and individualized treatment, the Court stated that allegations of intentional and "wholly arbitrary" discrimination were sufficient without reaching "the alternative theory of 'subjective ill will.' " *Id.* at 565, 120 S.Ct. 1073. In the instant case, this distinction does not salvage the plaintiff's claims. As explained above, allegations that others similarly situated obtained permits is not the equivalent of intentional and arbitrary discrimination. *Rosenfeld v. Board of Health of Chilmark, supra.*

APPENDIX D

(The Court's decision is referenced in a "Supreme Judicial Court of Massachusetts Further Appellate Review" table in the North Eastern Reporter.)

Supreme Judicial Court of Massachusetts.

Francis E. Daddario
v.
Cape Cod Commission

February 27, 2003

Appeal From: 56 Mass.App.Ct. 764, 780 N.E.2d 124.

DENIED.

(2)

Supreme Court, U.S.
FILED
OCT 6 - 2003
OFFICE OF THE CLERK

No. 03-408

IN THE

Supreme Court of the United States

LORENA DADDARIO, AS PERSONAL REPRESENTATIVE OF FRANCIS E. DADDARIO,

Petitioner,

v.

THE CAPE COD COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

BRIEF IN OPPOSITION

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Dated: October, 2003

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STATEMENT OF THE CASE

Petitioner's statement of "Material Facts" overlooks or misstates several important points. The first and most critical of these is that the Cape Cod Commission ("Commission") denied Petitioner only the specific mining project proposed to the Commission. Petitioner does not identify any aspect of the Commission's decision, or the Regional Policy Plan (which guided the Commission's review process), that categorically prohibits Petitioner from extracting sand and gravel from his property. Despite Petitioner's urgings, the Supreme Judicial Court did not accept Petitioner's argument that the mining configuration he proposed is the only viable means of extracting sand and gravel from his property. *Daddario v. Cape Cod Comm'n*, 425 Mass. 411, 417 (1997) (*see* Petition for Writ of Certiorari ("Pet.") Appendix ("App.") at 29a).

Petitioner instead argues that the alternative proposals advanced by the Commission's staff during the review process were "facially infeasible," because those proposals called for mining within the 200-foot buffer required by the Falmouth bylaw. (Pet. at 5.) However, as noted by the Supreme Judicial Court in its decision, this buffer requirement can be waived with the assent of the applicant's abutter,[1] thereby undermining any arguments he makes about the feasibility of the Commission's proposals.

Petitioner claims that his estimate of the value of his land for sand and gravel was "unchallenged." (Pet. at 6.) Yet, the trial judge did not adopt the

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[1] The property abutting this portion of Petitioner's property is also a sand and gravel pit. Quite logically, the Commission's staff concluded that the buffer requirement made little sense where adjoining properties would both involve sand and gravel mining, and left it to Petitioner to obtain the consent of his abutter to waive the buffer requirement. Petitioner, having previously sued his abutter to block a special permit for mining sand and gravel on that adjoining property, was apparently unwilling to seek that waiver.

landowner's evidence as to value. The Commission's evidence, from a professional geologist and real estate appraiser, indicated that (a) given the absence of any geological borings to establish the quantity and quality of the reserve, the economic feasibility of mining was speculative, (b) a prudent investor would not pay for unproven reserves, and (c) the highest and best use of the property was residential. The trial judge made no findings as to (a) the value of the property for mining, or (b) specific "before-" and "after-imposition" values.

Petitioner incorrectly asserts that the Supreme Judicial Court failed to consider his argument that he "owned a separate and distinct mining estate recognized for takings purposes by state law." (Pet. at 6.) To the contrary, the Supreme Judicial Court specifically considered and rejected that argument, stating that the taking analysis must consider "the property as a whole." (Pet. App. at 28a.) Significantly, the Supreme Judicial Court relied on this Court's decision in *Penn Central Transp. Co. v. New York City*, 483 U.S. 104, 130-31 (1978), to support rejection of Petitioner's argument on this issue. As Petitioner holds the fee simple absolute title to his property, the facts of this case provide no basis for this Court to revisit the established precedent of *Penn Central*.

REASONS FOR DENYING THE WRIT

I. This Court already denied Petitioner's 1997 Petition for Certiorari, and the current Petition is merely a recitation of the 1997 Petition that does not merit granting the Writ.

What is ostensibly an appeal of the Land Court's Remand Order is, in reality, a second appeal of the Supreme Judicial Court's opinion. In his most recent Petition for Certiorari, Petitioner Daddario states that he "[p]etitions this Court for a Writ of Certiorari to review the decision of the Supreme Judicial Court of the Commonwealth of Massachusetts entered on July 11, 1997." (Pet. at 1.) Some six years ago, this Court considered and denied a Petition for Writ of Certiorari for this very decision. *Daddario v. Cape Cod Comm'n*, 522 U.S. 1036 (1997). Following remand by the Supreme Judicial Court, the Land Court declined further consideration of the takings claim and granted the Commission's renewed motion to dismiss the remaining claims. *Daddario v. Cape Cod Comm'n*, 8 LCR 336 (2000) (Misc. Case. No. 215603). The Appeals Court of Massachusetts affirmed that dismissal on December 18, 2002 (56 Mass. App. Ct. 764), and the Supreme Judicial Court denied Petitioner's Request for Further Appellate Review on February 27, 2003. *Daddario v. Cape Cod Comm'n*, 438 Mass. 1110 (2003).

The current Petition makes no mention of the decisions on remand of the Land Court or Appeals Court of Massachusetts rejecting Petitioner's takings claim. Furthermore, Petitioner omits from the Petition Appendix the trial court decision he is appealing. Instead, the 2003 Petition is an almost-verbatim a reprint of the 1997 Petition. The 2003 Petition raises

four of the same issues raised in 1997,[2] in nearly identical fashion, while ignoring all of the issues subsequently raised on remand, specifically whether the Cape Cod Commission Act (1989 Mass. Acts c. 716) is void for vagueness, or whether Petitioner was denied equal protection of the laws. Although Petitioner does maintain his ripeness challenge, nothing in this Court's jurisprudence since 1997 warrants reconsideration of the ripeness issue.

The Petition thus fails on two grounds. First, Petitioner is barred from again challenging the 1997 Supreme Judicial Court decision, as this Court already ruled on (and denied) the 1997 Petition. Second, although Petitioner filed the current Petition within the 90-day period[3] set forth in Supreme Court Rule 13.1, Petitioner has not challenged any of the substantive grounds by which his claims were dismissed on remand. Accordingly, Petitioner has waived all challenges to the dismissal of his claims on remand, and there are no issues remaining for this Court to review.

II. Petitioner's taking claim is not ripe, and consideration of the claim by this Court would be premature and unnecessary.

Even if the Petition were procedurally sound, *see supra*, the taking claim is still not ripe for review. This Court has repeatedly held that "a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has

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[2] Petitioner has abandoned one issue raised in the 1997 Petition: whether the denial of a single land use permit application is sufficient to render Petitioner's regulatory takings claim ripe for judicial review.

[3] That period being measured from February 27, 2003, the date the Supreme Judicial Court denied Petitioner's Request for Further Appellate Review.

reached a final decision regarding the application of the regulations to the property at issue." *Williamson Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985); *accord, e.g., MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 351 (1986) ("Our cases uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it."). This rule "responds to the high degree of discretion characteristically possessed by land-use boards in softening the strictures of the general regulations they administer," which makes it particularly difficult for a court to assess the extent of development that will be permitted simply through inspection of the pertinent statutes and regulations. *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 738 (1997). "Until regulatory ... agencies exercise their full discretion in considering development plans for the property ... the extent of the restriction on property is not known and a regulatory taking has not yet been established." *Palazzolo v. Rhode Island*, 533 U.S. 606, 621 (2001); *accord, Suitum* 520 U.S. at 733-39.

Relying on established federal and state precedents, the Supreme Judicial Court properly concluded that Petitioner had not shown that the Commission rejected anything more than his most-preferred mining plan. *See Daddario*, 425 Mass. at 414, 417,*citing, inter alia, MacDonald*, 477 U.S. at 347, 351-53 & n.8, n.9 (taking claim dismissed where only one subdivision plan submitted and rejected, because possibility existed that less intensive development would be permitted); *Williamson*, 473 U.S. at 186-88, 194 (where landowner failed to seek further relief after proposal rejected, agency had not "arrived at a final, definitive position" that would

"conclusively determine" whether developer was denied all reasonable beneficial use of property).[4]

Petitioner asserted that the Commission's denial of a single application for his mining proposal was sufficient to establish ripeness for a taking claim, despite his failure to propose any alternative uses or development configurations. The Supreme Judicial Court clearly rejected this position by finding (i) that the Commission's denial of the permit "did not preclude less extensive sand and gravel operations," and (ii) that Petitioner could not base his taking claim solely on the impact of regulation on the value of his property for sand and gravel mining alone where (as the record below showed) the property had "other valuable uses" and had "substantial value even without a permit to remove sand and gravel." *Daddario* 425 Mass. at 416-18, n.4 & n.5, *citing, inter alia, Moskow v. Comm'r of Envtl. Mgmt.*, 384 Mass. 530, 533-34 (1981) (taking claim requires analysis of

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[4] *See also Penn Central*, 438 U.S. at 136-37 (claim unripe after rejection of one plan, because no approval sought for any other); *Good v. United States*, 39 Fed. Cl. 81, 102-03 (1997) (ripeness doctrine requires good faith effort by developer to negotiate with permitting agency after initial denial), *aff'd*, 189 F.3d 1355 (Fed. Cir. 1999); *Southview Assoc., Ltd. v. Bongartz*, 980 F.2d 84, 98 (2nd Cir. 1992) (claim unripe even after state supreme court affirmed permit denial, because developer not precluded from submitting another plan for less intensive development in less critical areas of property). *Cf. Suitum*, 520 U.S. at 729-33 (1997) (claim ripe where agency had determined that landowner's property could not be developed or used for any productive purpose); *Palazzolo*, 533 U.S. at 625-26 (claim ripe and no further applications required where application from an owner and denial by state agency makes clear the extent of development permitted); *City of Monterey v. Del Monte Dunes at Monterey Ltd.*, 526 U.S. 687, 698 (1999) (city's rejection of five proposals and nineteen different site plans sufficiently final to render claim ripe for review); *accord Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 479 (2001) (issues deemed ripe when they would not benefit from any further factual development and when the court would be in no better position to adjudicate the issues in the future than it is now).

rights in entire parcel, not in discrete segment); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 496-99 (1987) (restricting mineral extraction not a taking if property as a whole retains substantial value); *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 295-97 (1981) (same). *See also Andrus v. Allard*, 444 U.S. 51, 65 (1979) (destroying one "strand" of owner's "bundle" of property rights is not a taking).

III. Prudential ripeness is jurisdictional in nature and may be raised *sua sponte* by an appellate court.

Petitioner asserts that ripeness should not be an issue for judicial consideration in this case. This argument is without legal or factual merit. The function of the ripeness doctrine is to determine whether a party has brought an action prematurely, and counsels judicial abstention until such time as a dispute is sufficiently concrete to satisfy the constitutional and prudential requirements of the doctrine. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967), *overruled on other grounds*, *Califano v. Sanders*, 430 U.S. 99 (1977). Ripeness principles serve in part to protect the courts from involvement in litigation that might turn out to be unnecessary if the administrative process alleviates the plaintiff's concern. *See, e.g., Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 736 (1998); *Federal Trade Comm'n. v. Standard Oil Co.*, 449 U.S. 232, 242 (1980). Adherence to those principles also ensures that, if judicial involvement is ultimately required, the nature and practical consequences of agency policy will be clear to the reviewing court. *See, e.g., Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 164 (1967) ("judicial appraisal of [the relevant] factors is likely to stand on a much surer footing in the context of a specific application of this regulation than could be the case in

the framework of the generalized challenge made here").

Petitioner argues that "a regulatory agency's concession of prudential ripeness at trial must be binding ...." (Pet. at 15.) However, ripeness is a preliminary jurisdictional requirement for a constitutional taking claim. Contrary to Daddario's contention, the Commission did raise the ripeness issue at trial in the Land Court. *See* Defendant's Request for Rulings of Law, para. 16 (Mass. App. Ct. Appendix ("A.") 88). In any event, federal precedent agrees with the Supreme Judicial Court's holding that considerations of ripeness are sufficiently important that a court is required to raise the issue *sua sponte*, even though the parties do not.[5] There is simply no meritorious issue or federal conflict concerning ripeness that requires clarification by this Court.

IV. Beyond the procedural and ripeness flaws with the Petition, there has been no regulatory taking in this case.

Petitioner attempts to recast his claim as a categorical taking by arguing that, regardless of the remaining value of the property as a whole, he has been deprived of all economic value of his "mining estate," which he proposes as the property interest "denominator" against which he would measure the loss of value. Petitioner contends that his case furnishes this Court with an opportunity to resolve

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[5] *See e.g., Peachlum v. City of York*, 333 F.3d 429 (3rd Cir. 2003); *Adland v. Russ*, 307 F.3d 471, 490 (6th Cir. 2002), *cert. denied*, __ U.S. __, 123 S. Ct. 1909 (2003); *Orix Credit Alliance, Inc. v. Wolfe*, 212 F.3d 891, 895 (5th Cir. 2000); *Utah v. United States Dep't of the Interior*, 210 F.3d 1193, 1196 n.1 (10th Cir. 2000); *Nutritional Health Alliance v. Shalala*, 144 F.3d 220, 225 (2nd Cir. 1998); *Poland v. Stewart*, 117 F.3d 1094, 1104 (9th Cir. 1997); *Cheffer v. Reno*, 55 F.3d 1517, 1523 (11th Cir. 1995); *Felmeister v. Office of Attorney of Ethics*, 856 F.2d 529, 535 (3rd Cir. 1988); *Bergstrom v. Bergstrom*, 623 F.2d 517, 519 (8th Cir. 1980).

purported conflicts and inconsistencies in the decisions of circuit courts, state courts, and this Court itself as to the definition of the property interests at stake in regulatory takings cases. (Pet. at 8-11.) Neither contention has merit. This court's recent decision in *Tahoe-Sierra Preservation Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002) settled the denominator issue, as the Court stated that, in regulatory takings cases, a court must focus on the parcel as a whole and not disaggregate the property into segments. *Id.* at 331. "The starting point ... [should be] ... whether there [is] a total taking of the entire parcel; if not, then Penn Central [is] the proper framework." *Id.*

Petitioner's efforts to focus his takings claim on separate "mineral estate" ignores the full extent of his title. Petitioner owns the entire fee simple title to his land (acquired in 1964, thirty years before he applied for a special permit for sand and gravel mining). This case does not involve an attempt to exercise mineral rights acquired separately from the underlying title; there simply is not, and never was, a separate "mineral estate."[6] As both the trial court and the Supreme Judicial Court perceived, what Petitioner describes as his "mineral estate" is simply his desire to use the property in a particular manner, and to a particular extent, even though many other economically viable options are available to him.

Petitioner's claim of a conflict between federal circuits and state courts regarding the denominator issue ignores the point that property rights are defined by state law. *See Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980), *citing Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). Petitioner cites *Whitney Benefits, Inc. v. United*

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[6] Petitioner does not dispute that his fee simple absolute title comprehends subsurface, surface, air, and water rights, and any other beneficial interest appurtenant to the land.

States, 926 F.2d 1169, 1172 (Fed. Cir. 1991) as being in direct conflict with the Supreme Judicial Court's holding. While Petitioner argues that the estate against which loss is to be measured for takings purposes is the mineral estate, that rule only obtains "where state property law recognizes separate mineral and surface estates." (Pet. at 10) (citing *Whitney Benefits*, 926 F.2d at 1174). Neither the Massachusetts courts nor the legislature has ever established such a law.[7] Accordingly, because Petitioner owns the entire fee simple, the property as a whole is the controlling denominator.

Petitioner also points to cases from other state courts, all of which fail to support his claim to a separate mineral estate when none is recognized by state law. *See Machipongo Land & Coal Co. v. Commonwealth*, 799 A.2d 751, 768 (Pa. 2002), *cert. denied*, __ U.S. __, 123 S. Ct. 486 (2002) ("[f]ollowing Tahoe-Sierra, there can be no dispute that the 'property as a whole' rule remains controlling"); *Zealy v. City of Waukesha*, 548 N.W. 2d 528, 533 (Wis. 1996) (finding that the property at issue is entire 10.4-acre parcel). *Cf. State ex rel. R.T.G., Inc. v. State*, 780 N.E. 2d. 998, 1008 (Ohio 2002) (finding that, where Ohio recognizes a separate mineral estate, the surface rights are nothing more than an impediment to acquiring the coal).

Casting about for favorable federal precedent, Petitioner places heavy emphasis on *Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560 (Fed. Cir. 1994), *cert. denied*, 513 U.S. 1109 (1995), which he asserts recognizes the existence of a separate mineral estate. He asks this Court to adopt and apply his interpretation of *Florida Rock*, thereby reversing the Supreme Judicial Court's "inconsistent" decision. The Commission respectfully suggests (a) that the value of

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[7] Petitioner cites no Massachusetts statute or reported case that recognizes the existence of a separate mineral estate.

the non-mineral estate in *Florida Rock* was so insubstantial as to preclude any comparison to Petitioner's land, and (b) that, if this Court had been inclined to review *Florida Rock*, it would have allowed a writ of certiorari, a step that it declined to take. *Id.*

Petitioner's "mining estate" argument is further undercut by a factual flaw. The Supreme Judicial Court expressly concluded that Petitioner has not lost the ability to mine sand and gravel from his land as a result of the Commission's decision. (Pet. App. at 29a) ("This denial did not preclude less extensive sand and gravel operations."). Only a single, particular plan of excavation was rejected. Nothing in the Regional Policy Plan prohibits sand and gravel mining. Petitioner remains free to seek a permit for a differently configured mine. There is neither a factual nor a legal basis for a claim of a categorical taking, regardless of the denominator.

Petitioner seeks support for his claim in the discussion of the "denominator" issue in *Lucas v. South Carolina Coastal Comm'n*, 505 U.S. 1003, 1016-17, n.7 (1992). Although footnote 7 in *Lucas* raises the possibility of separable property interests, it does not reject the *Penn Central* formulation; it merely suggests that the selection of a denominator might depend on "how the owner's reasonable expectations have been shaped by the State's law of property." In view of the full array of property interests inhering in Petitioner's fee simple absolute title and the variety of valuable alternative development possibilities that remain for the property, the question raised in *Lucas*'s footnote 7 finds as little application here as it did in *Lucas*.

By considering the value of the property as a whole when evaluating Petitioner's takings claim, the Supreme Judicial Court followed this Court's prior holdings. In *Penn Central*, 438 U.S. at 130-31, this Court rejected the argument that the airspace above

Grand Central Terminal should be considered as a separate and discrete property interest:

> "'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole . . . ."

In later decisions, this Court has reiterated that property rights (whether real, personal, or intangible) are to be viewed "as a whole" when analyzing regulatory taking claims. *See Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 643-645 (1993) (no taking found where pension-plan liability imposed on withdrawing employer is 46% of net worth); *Keystone*, 480 U.S. at 497-98 (coal required to be left in place not defined as separate segment of property for taking analysis); *Andrus* , 444 U.S. at 65-66 (where owner possesses full "bundle" of property rights, destruction of one "strand" not a taking, because aggregate must be viewed in entirety).[8]

Because the Commission did not effect a categorical taking by denying all economically beneficial or productive use of Petitioner's land, the Supreme Judicial Court considered whether

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[8] *See also Villas of Lake Jackson, Ltd. v. Leon County*, 121 F.3d 610, 614 (11th Cir. 1997) (regulatory deprivation of single use of real property must be considered in light of remaining use of property as a whole). *Cf. Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) (permanent physical occupation is most serious invasion of property interests, because government takes not a single strand, but a "slice of every strand" from bundle of property rights).

government regulation nonetheless so affected the use of the land as to amount to a taking. That court applied the factors identified in *Penn Central*: "the economic impact of the regulation on the claimant," "the extent to which the regulation has interfered with distinct investment-backed expectations," and "the character of the government action." (Pet. App. at 27a) (*quoting Penn Central*, 438 U.S. at 124). The court recognized that the analysis of regulatory taking claims is fact dependent, involving "essentially ad hoc, factual inquiries." (Pet. App. at 28a) (*quoting Penn Central*, 438 U.S. at 124). Looking primarily at the economic impact of the regulation, the Supreme Judicial Court concluded that the record did not support the trial judge's finding of a taking, because the property retained "substantial value." The Commission's rejection of Petitioner's particular plan did not foreclose other sand and gravel operations; the Commission's staff displayed a willingness to allow less extensive mining operations, and indeed, proposed alternative plans to Petitioner (one alternative that Petitioner declined to consider would have allowed sand and gravel extraction on twenty-five acres, in comparison with the thirty-two acres desired by Petitioner). (Pet. App. at 29a.) Furthermore, evidence at trial supported the Supreme Judicial Court's finding that the property had substantial value for other uses allowed as-of-right under municipal zoning, including residential development.[9] Although the trial judge made no specific finding on the extent to which the Commission's rejection of Petitioner's proposal affected the property's value, the trial court (and the Supreme Judicial Court on appeal)

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[9] The Commission's appraisal expert testified that the property was worth $550,000 to $600,000 if developed for residential use. Petitioner's expert testified that the property would be worth $465,000 even if limited to use as conservation land. As of 1996, the property's assessed value for taxation was $474,600. A. 1495, 1503.

concluded that the property retained substantial value for uses other than sand and gravel mining. *Id.*

The Supreme Judicial Court did not address the remaining "prongs" of the *Penn Central* test, but if the court had done so, the results would have reinforced its conclusion. The Commission's decision did not unreasonably interfere with Petitioner's "distinct investment-backed expectations." Petitioner asserts that he acquired the property in 1964 for the primary purpose of mining (Pet. at 4), but leaves unexplained the thirty-year delay before he sought a permit to carry out that activity. Assuming that Petitioner's expectations also included appreciation in land values, that expectation has been amply fulfilled. He purchased the property for roughly $45,000, and shortly thereafter recouped his initial investment by selling a small portion of the property for that same price. The property's current value, even if the land were not used at all for sand and gravel mining, is more than ten times Petitioner's initial investment.[10] *See supra* at n.7. The Commission's decision does not prevent Petitioner from profiting from his ownership and obtaining a reasonable return on his investment. *See Penn Central*, 438 U.S. at 136. *See also Florida Rock Indus., Inc. v. United States*, 791 F.2d 893, 905 (Fed. Cir. 1986) (*Florida Rock II*) (taking analysis should consider impact of regulation on owner's opportunity to recoup investment).

Petitioner should have expected, when he purchased the land, that sand and gravel mining would be subject to government regulation. Although the Commission did not exist in 1964, the type of

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[10] After he purchased the property, but before Petitioner applied for the sand and gravel mining permit, he had modest expectations for the value of the property. In 1989, Petitioner sought and obtained an abatement of the property's assessed value from $770,000 to $304,000. That abated value was well below the 1996 assessed value and the current value estimates discussed *supra* at n.9.

land-use regulation at issue here is hardly novel. Massachusetts has long authorized municipal zoning as well as general town by-laws regulating sand and gravel mining. *See* Mass. Gen. Laws ch. 40, § 21, cl. (17) (2002); *Butler v. East Bridgewater*, 330 Mass. 33, 36-37 (1953) (upholding municipal bylaw regulating sand, gravel, soil, and loam removal). *See also Goldblatt v. Hempstead*, 369 U.S. 590, 592-96 (1962) (town by-law barring earth excavation not a taking). The Commission's review of developments of regional impact to ensure their conformance to the county-enacted Regional Policy Plan is comparable to forms of municipal land-use regulation which predated Petitioner's property acquisition.

Analysis of the third *Penn Central* factor, "the character of the government action," also supports the conclusion that no regulatory taking has occurred. The government activity here is not comparable to the examples offered in *Penn Central*, in which government agencies undertook periodic physical intrusions, including overflights, gun firings, and floodings, that effectively resulted in the property being "taken" for public purposes. *Penn Central*, 438 U.S. at 124, 128.

The Commission's denial of Petitioner's mining proposal cannot be characterized as a regulatory taking, when that decision is measured against each of the categories of takings that this Court has recognized. A landowner cannot prove a taking simply by showing that he has filed a single unsuccessful application to exploit a property interest that he previously believed to be available for development. *Penn Central*, 438 U.S. at 130. The Supreme Judicial Court correctly concluded that Petitioner's constitutional rights had not been violated. Petitioner's taking claim is without merit, and his Petition for a Writ of Certiorari should be denied.

CONCLUSION

For the foregoing reasons, the Respondent respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully Submitted,
CAPE COD COMMISSION

By Its Counsel

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Dated: October, 2003

(3)

Supreme Court, U.S.
FILED
OCT 10 2009
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No. 03-408

IN THE

Supreme Court of the United States

LORENA DADDARIO, AS PERSONAL REPRESENTATIVE OF FRANCIS E. DADDARIO,

Petitioner,

v.

THE CAPE COD COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

REPLY TO BRIEF IN OPPOSITION

THOMAS OWEN MORIARTY*
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Dated: October 10, 2003

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

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United States Code

28 U.S.C. § 1257(a) 2

INTRODUCTION

Lorena Daddario ("Petitioner") hereby files this reply brief addressing the Respondent's argument, first raised in its Brief in Opposition, that this Honorable Court has previously considered the constitutional issues raised in the Petition for Certiorari and denied review.

I. THE PETITIONER IS NOT BARRED FROM CHALLENGING THE 1997 DECISION OF THE SUPREME JUDICIAL COURT.

The Respondent asserts that this Honorable Court previously considered the constitutional issues raised in the pending Petition for Certiorari and denied review on the merits of same. As discussed below, the argument is without merit.

The Petitioner initially filed a Petition for Certiorari on or about October 8, 1997.

The Respondent filed a Brief in Opposition on or about November 10, 1997 (the "1997 Opposition"). The body of the Opposition is set forth in the Supplemental Appendix appended hereto (hereinafter "S.A.___").

In its 1997 Opposition, the Respondent argued that the Petitioner's claim was not yet ripe for review by this Honorable Court. (S.A. 12).

Specifically, the Respondent asserted that the Petitioner had not exhausted available state law remedies, citing § 17(b) of the special act establishing the Respondent Commission. (S.A. 12).

The Respondent specifically urged this Honorable Court not to "consider an appeal on constitutional grounds before a final decision has been reached on the Petitioner's statutory claim for relief." (S.A. 12-13).[1]

The initial Petition for Certiorari was denied on December 15, 1997.

Thereafter, on or about November 22, 1999, the Land Court dismissed Petitioner's statutory claim for relief under said § 17.

A final judgment eventually entered in the Land Court on September 19, 2000, and was thereafter appealed.

As acknowledged by the Respondent, a final decision for purposes of 28 U.S.C. § 1257(a) was made in this matter on February 27, 2003.

It is, of course, impossible to know if this Honorable Court's order denying Petitioner's 1997 Petition for Certiorari was premised, in any part, upon Respondent's argument that a statutory remedy under § 17 remained available.

The Respondent must also concede the uncertainty.

The Respondent, having vigorously advanced the exhaustion argument in its 1997 Opposition, cannot credibly maintain that this Honorable Court has already necessarily considered the constitutional issues raised by the Petitioner and denied review on the merits of those issues.

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[1] The impact of Respondent's previous opposition premised upon procedural grounds is significant as, among other factors, the recognition of a separate mining estate in the Commonwealth of Massachusetts provides an opportunity for this Honorable Court to squarely address the denominator issue on the merits. *Joseph De Vries & Sons* v. *Commonwealth*, 339 Mass 663, 162 N.E.2d 269 (1959); *Gray* v. *Handy*, 349 Mass. 438, 208 N.E.2d 829 (1965); *Bates Sand & Gravel Co.* v. *Commonwealth*, 380 Mass. 933, 404 N.E.2d 81 (1980).

To the extent the existence of a statutory claim for relief under § 17 rendered the 1997 Petition premature, the constitutional issues are now clearly presented in the pending Petition for Certiorari.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX

No. 97-632

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

FRANCIS E. DADDARIO,

Petitioner,

v.

THE CAPE COD COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The Petitioner's statement of "Material Facts" overlooks or misstates several important points. The first and most critical of these is that the Cape Cod Commission ("Commission") denied the Petitioner only the specific mining project proposed to the Commission. The Petitioner does not identify any aspect of the Commission's decision, or the Regional Policy Plan (which guided the Commission's review process), that prohibits the Petitioner from extracting sand and gravel from his property. Despite the Petitioner's urgings, the Supreme Judicial Court did

not accept the Petitioner's argument that the mining configuration he proposed is the only viable means of extracting sand and gravel from his property. *Daddario v. Cape Cod Comm'n*, 425 Mass. 411, 417 (1997) (*see* Petition for Writ of Certiorari ("Pet.") Appendix ("App.") at 9a).

The Petitioner instead argues that the alternative proposals advanced by the Commission's staff during the review process were "facially infeasible," because those proposals called for mining within the 200-foot buffer required by the Falmouth bylaw. (*See* Pet. at 5.) However, as noted by the Supreme Judicial Court in its decision, this buffer requirement can be waived with the assent of the applicant's abutter. (*See Pet.* App. at 3a n.1.) The Petitioner omits the fact that he did not even attempt to obtain this consent from his abutter,[1] thereby undermining any arguments he makes about the feasibility of the Commission's proposals.

The Petitioner claims that his estimate of the value of his land for sand and gravel use was "unchallenged." (Pet. at 6.) Not even the trial judge adopted the landowner's evidence as to value. The Commission's evidence, from a professional geologist and a real estate appraiser, indicated that (a) in the absence of any geological borings to establish the quantity and quality of the reserve, the economic feasibility of mining was speculative, (b) a prudent investor would not pay for unproven reserves, and (c) the highest and best use of the property was residential. The trial judge made no findings as to (a)

[1] The property abutting this portion of the Petitioner's property is also a sand and gravel pit. Quite logically, the Commission's staff concluded that the buffer requirement made little sense where adjoining properties would both involve sand and gravel mining, and left it to the Petitioner to obtain the consent of his abutter to waive the buffer requirement. The Petitioner, having previously sued this abutter to block a special permit for mining sand and gravel, was apparently unwilling to request that waiver.

the value of the property for mining, or (b) specific "before" and "after" values.

The Petitioner asserts incorrectly that the Supreme Judicial Court failed to consider his argument that "he owned a separate and distinct mining estate recognized for takings purposes by state law." (Pet. at 6-7.) The Supreme Judicial Court specifically considered and rejected that position, stating that the taking analysis must consider "the property as a whole." (Pet. App. at 8a.) Significantly, the Supreme Judicial Court relied on this Court's decision in *Penn Central Transp. Co. v. New York City*, 438 U.S. 1043, 130-31 (1978), to support rejection of the Petitioner's argument on this issue. As the Petitioner holds fee simple title to his property, the facts of this case raise no compelling reason why this Court should review the established precedent of *Penn Central.*

Finally, the Petitioner fails to mention the current status of this case. in the trial court. Following the remand by the Supreme Judicial Court, the Petitioner requested the trial court to conduct further fact-finding on several issues relating to his taking claim, including the value of his property before and after the Commission's decision. In light of this request, the trial court instructed the parties to brief the issues before the trial court as a result of the remand. In response, the Commission has argued that the sole remaining issue is the Petitioner's statutory appeal challenging the validity of the Commission's decision under its organic act, a claim left unaddressed by the trial court. The Petitioner, however, argues in his brief to the trial court that the Supreme Judicial Court's decision adjudicated at most only his "categorical" taking claim, leaving him free to submit additional evidence of a partial taking under the "ad hoc" factors enumerated in *Penn Central,* 438 U.S. at 124. A copy of the Petitioner's brief to the trial court is attached in the appendix hereto.

REASONS FOR DENYING THE WRIT

I. The Massachusetts Supreme Judicial Court's ruling that the Petitioner's "taking" claim was without factual or legal basis follows this Court's prior holdings.

There is simply no merit to the Petitioner's claim that a taking has occurred, and hence there is no reason for this Court to grant his petition. The Commission's denial of a single application to mine sand and gravel did not effect any of the types of takings under this Court's prior decisions. This is evident from the Supreme Judicial Court's ruling that the trial court's decision lacked sufficient findings to support the Petitioner's claim.

The governmental action here cannot be characterized as a "categorical" taking. *Cf. Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992). The Petitioner does not claim a physical intrusion upon his property, nor a required dedication of land for public use. *Cf. Dolan v. Tigard*, 512 U.S. 374, 388-89, 394-95 (1994) (dedication of public easements for floodplain greenway and pedestrian/ bicycle pathway); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 836-39 (1987) (grant of easement for public access to private beach); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436-39 (1982) (cable TV box installation on private apartment building).

Nor is this an instance where government regulation has deprived the property owner of "all economically beneficial or productive use of land," amounting to a *per se* categorical taking. *Cf. Lucas*, 505 U.S. at 1015 (barrier beach statute preventing any construction on landowner's property The Supreme Judicial Court found that (a) in denying the Petitioner's specific proposal to mine sand and gravel from thirty-two acres, the Commission neither prohibited mining nor precluded less extensive

mining, and (b) the property had substantial value for other uses, including residential development (allowed as-of-right under Falmouth's zoning).[2] (Pet. App. at 9a.) Even the trial judge acknowledged that the property "may still have substantial value for other development." (Pet. App. at 24a.)

Thus, the Petitioner is not a landowner who "has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle[.]" *Lucas,* 505 U.S. at 1019 (emphasis in original). The Petitioner nonetheless attempts to recast his claim as a categorical taking by arguing that, regardless of the remaining value of the property as a whole he has been deprived of all economic value of his "mining estate," which he proposes as the property, interest "denominator" against which he would measure the loss of value. The Petitioner contends that his case furnishes this Court with an opportunity to resolve what he perceives to be conflicts and inconsistencies in the decisions of Circuit Courts, state courts, and this Court itself as to the definition of the, property interests at stake in takings cases. (Pet. at 8-11.) Neither contention has merit.

First, the Petitioner's characterization of his property interest as a separate "mineral estate" ignores the true nature of his title. The Petitioner owns the entire fee simple title to his land (acquired in 1964, thirty years before he applied for a special permit for sand and gravel mining). This case does not involve an attempt to exercise mineral rights acquired separately from the underlying title; there simply is not, and never was, a separate "mineral estate."[3] As both the trial court and the Supreme

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[2] Such development might not be subject to review by the Commission, which reviews only development activity that exceeds specified thresholds. (*See* Pet. App. at 15a-16a.)

[3] The Petitioner's fee simple absolute comprehends subsurface, surface, air, and water rights, and any other beneficial interest appurtenant to the land.

Judicial Court perceived, what the Petitioner describes as his "mineral estate" is simply his desire to use the property in a particular manner, and to a particular extent, when many other options are, available to him.[4]

Second, by considering the value of the property as a whole when evaluating the Petitioner's takings claim, the Supreme Judicial Court followed this Court's prior holdings. In *Penn Central,* 438 U.S. at 130-31, this Court rejected the argument that the airspace above Grand Central Terminal should be considered as a separate and discrete property interest:

> "'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole.

In later decisions, this Court has reiterated that property rights (whether real, personal, or intangible) are to be viewed "as a whole" when analyzing regulatory taking claims. *See Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.,* 508 U.S. 602, 643-645 (1993) (no taking found where pension-plan liability imposed on withdrawing

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[4] Furthermore, in order to review the State's decision on the Petitioner's claim, based upon the supposed existence of a separate mineral estate, this Court would necessarily have to determine the extent to which the property law of Massachusetts recognizes and protects mineral rights as a separate property interest, a topic that was not addressed by the Supreme Judicial Court.

employer is 46% of net worth); *Keystone Bituminous Coal Ass'n v. DeBenedictis,* 480 U.S. 470, 497-8 (1987) (coal required to be left in place not defined as separate segment of property for taking analysis); *Andrus v. Allard,* 444 U.S. 51, 65-66 (1979) (where owner possesses full "bundle" of property rights, destruction of one "strand" not a taking, because aggregate must be viewed in entirety); *see also Villas of Lake Jackson, Ltd. v. Leon County,* 121 F.3d 610, 614 (11th Cir. 1997) (regulatory deprivation of single use of real property must be considered in light of remaining use of property as a whole); *cf. Loretto,* 458 U.S. at 435 (permanent physical occupation is most serious invasion of property interests, because government takes not a single strand, but a "slice of every strand" from bundle of property rights).

The Petitioner seeks support for his claim in the discussion of the "denominator" problem in *Lucas,* 505 U.S. at 1016-17, n.7. Although Footnote 7 raises the possibility of separable property interests, it does not reject the *Penn Central* formulation; it merely suggests that the selection of a denominator might depend on "how the owner's reasonable expectations have been shaped by the State's law of property." In view of the fall array of property interests inhering in the Petitioner's fee simple absolute and the availability of valuable alternative development possibilities, the question raised in *Lucas's* footnote 7 finds as little application here as it did in *Lucas.*

Seeking case support, the Petitioner points to two Circuit Court decisions that he asserts recognize the existence of a separate mineral estate. He asks this Court to adopt and apply his interpretation of those cases, thereby reversing the Supreme Judicial Court's "inconsistent" decision. The Respondent respectfully suggests (a) that the value of the non-mineral estate in those cases was so insubstantial as to negate any comparison to Petitioner's land, and (b) that if this Court had been inclined to review those two decisions, it would have allowed writs of

certiorari, a step that it declined to take. *See Florida Rock Indus. v. United States,* 18 F.3d 1560 (Fed. Cir. 1994), *cert. denied,* 513 U.S. 1109 (1995); *Whitney Benefits, Inc. v. United States,* 926 F.2d 1169 (Fed. Cir. 1991), *cert. denied,* 502 U.S. 952 (1991).

The Petitioner's "mining estate" argument is undercut by a factual flaw as well. The Supreme Judicial Court expressly concluded that the Petitioner has not lost the ability to mine sand and gravel from his land as a result of the Commission's decision. (Pet. App. at 9a) ("This denial did not preclude less extensive sand and gravel operations."). Only a single, particular plan of excavation was rejected. Nothing in the Regional Policy Plan prohibits sand and gravel mining. The Petitioner is free to seek a permit for a differently configured mine. There is neither a factual nor a legal basis for a claim of a categorical taking, regardless of the denominator.

Because the Commission did not effect a categorical taking by denying all economically beneficial or productive use of the Petitioner's land, the Supreme Judicial Court considered whether government regulation nonetheless so affected the use of the land as to amount to a taking. That court applied the factors identified in *Penn Central:* "the economic impact of the regulation on the claimant," "the extent to which the regulation has interfered with distinct investment-backed expectations," and "the character of the government action." (Pet. App. at 7a) (*quoting Penn Central,* 438 U.S. at 124). The court recognized that the analysis of regulatory taking claims is fact dependent, involving "essentially ad hoc, factual inquiries." (Pet. App. at 8a) (*quoting Penn Central,* 438 U.S. at 124). Looking primarily at the economic impact of the regulation, the Supreme Judicial Court concluded that the record did not support the trial judge's finding of a taking, because the property retained "substantial value." The Commission's rejection of the Petitioner's particular plan did not foreclose other sand and gravel

operations; the Commission's staff displayed a willingness to allow less extensive operations, and indeed, proposed alternative plans (one that the Petitioner declined to consider would have allowed sand and gravel extraction on twenty-five acres, in comparison with the thirty-two acres desired by the Petitioner). (Pet. App. at 9a.) Furthermore, evidence at trial supported the Supreme Judicial Court's finding that the property had substantial value for other uses allowed of right under municipal zoning, including residential development.[5] Although the trial judge made no finding on the property's value before and after the Commission's rejection of the Petitioner's proposal, the Supreme Judicial Court concluded that the property retained substantial value for uses other than sand and gravel mining, and that the record did not support the trial judge's ruling that a regulatory taking had occurred. *Id.*

The Supreme Judicial Court did not address the remaining "prongs" of the *Penn Central* test, but if the court had done so, the results would have reinforced its conclusion. The Commission's decision did not unreasonably interfere with the Petitioner's "distinct investment-backed expectations." The Petitioner asserts that he acquired the property in 1964 for the primary purpose of mining (Pet. at 4), but leaves unexplained the thirty-year delay before he sought a permit to carry out that activity. Assuming that the Petitioner also hoped to benefit from appreciation in land values, that expectation has been amply fulfilled. He purchased the property for about $45,000, and shortly thereafter recouped his initial investment by selling a small portion of the property for that same price. The property's current value,

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[5] The Commission's appraisal expert testified that the property was worth $550,000 to $600,000 if devoted to residential use. The Petitioner's expert testified that the property would be worth $465,000 even if limited to use as conservation land. As of 1996, the property's assessed value for taxation was $474,600.

even if the land is not used at all for sand and gravel mining, is ten to thirteen times the Petitioner's initial investment.[6] See *supra* at n.5. The Commission's decision does not prevent the Petitioner from profiting from his ownership and obtaining a reasonable return on his investment. *See Penn Central*, 438 U.S. at 136; *see also Florida Rock Indus., Inc. v. United States*, 791 F.2d 893, 905 (Fed. Cir. 1986) *(Florida Rock II)* (taking analysis should consider impact of regulation on owner's opportunity to recoup investment).

Furthermore, the Petitioner should have expected, when he purchased the land, that sand and gravel mining would be subject to government regulation. Although the Commission did not exist in 1964, the type of land-use regulation at issue here is hardly novel. Massachusetts has long authorized municipal zoning as well as general town by-laws regulating sand and gravel mining. See Mass. G.L. c. 40, § 21, cl. (17) (1996); *Butler v. East Bridgewater,* 330 Mass. 33, 36-37 (1953) (upholding municipal bylaw regulating sand, gravel, soil, and loam removal); *see also Goldblatt v. Hempstead,* 369 U.S. 590, 592-96 (1962) (town by-law barring earth excavation not a taking). The Commission's review of developments of regional impact to ensure their conformance to the county-enacted Regional Policy Plan is comparable to forms of municipal land-use regulation which predated the Petitioner's property acquisition.

Analysis of the third *Penn Central* factor, "the character of the government action," also supports the conclusion that no regulatory taking has occurred. The government activity here is not comparable to the examples offered in *Penn Central,* in which

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[6] After he purchased the property but before the Petitioner applied for the sand and gravel mining permit, he had modest expectations for the value of the property. In 1989, he sought and obtained an abatement of the property's assessed value. The valuation was reduced from $770,000 to $304,000, well below the 1996 assessed value and the current value estimates discussed *supra* at n.5.

government agencies undertook periodic physical intrusions, including overflights, gun firings, and floodings, that effectively resulted in the property being "taken" for public purposes, *Penn Central,* 438 U.S. at 124, 128.

The Commission's denial of the Petitioner's mining proposal cannot be characterized as a regulatory taking, when that decision is measured against each of the possible categories of takings that this Court has established. A landowner does not prove a taking simply by showing that he has filed a single unsuccessful application to exploit a property interest that he previously believed to be available for development. *Penn Central,* 438 U.S. at 130. The Supreme Judicial Court correctly concluded that the Petitioner's constitutional rights had not been violated. The Petitioner's taking claim is without merit, and his petition for a writ of certiorari should be denied.[7]

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[7] This Court recently declined to review another Supreme Judicial Court decision in which that court rejected a taking claim after subjecting it to the *Penn Central* factor analysis. *See Leonard v. Brimfield,* 423 Mass. 152, *cert. denied,* ___ U.S. ___, 117 S. Ct. 582 (1996) (upholding special permit that limited construction in a flood plain zone, effectively limiting construction to six of sixteen acres owned).

II. The Petitioner's taking claim is not ripe, and consideration of the claim by this Court would be premature and unnecessary, because the Petitioner, having neither exhausted his state-law remedies nor sought approval of alternative designs, has not established the degree to which uses of his property have been restricted by government regulation.

As the Commission argues *supra,* this Court should deny the Petitioner's petition for a writ of certiorari because it finds no support in this Court's prior decisions on regulatory takings. Even if this Court were to find that the Petitioner's claim had substantive merit and raised significant unresolved constitutional issues, this Court should still deny the petition, because the claim is not yet ripe for this Court's review. There are several reasons why consideration of the claim now would be premature.

(a) The Petitioner has not exhausted the state-law remedies available to him for relief from the Commission's decision. Section 17(b) of the special act establishing the Commission provides a right of judicial review to any party aggrieved by a commission decision on a development of regional impact. (Pet. App. at 6a.) The Petitioner's complaint raises both a statutory § 17 challenge to the Commission's decision and a constitutional taking claim. The trial judge never decided the § 17 appeal, relying instead on his taking analysis to overturn the Commission's decision. The Supreme Judicial Court rejected the taking claim (for lack of ripeness as well as lack of substantive merit), but did not address the § 17 claim, and instead remanded the case for further proceedings. Therefore, the Petitioner retains his statutory appeal, notwithstanding the Supreme Judicial Court's adjudication of his taking claim, and could still prevail on non-constitutional grounds. This Court need not consider an appeal on

constitutional grounds before a final decision has been reached on the Petitioner's statutory claim for relief. *See Williamson Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 187-88 (1985) (claim not ripe where landowner failed to seek variances after proposed plat rejected); *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 297 (1981) (claim not ripe where property owners failed to request variances or waivers from requirements of surface mining act).

(b) Even if the Petitioner loses his statutory challenge to the Commission's decision, the Commission's rejection of one mining proposal still leaves open the possibility that it would approve a differently configured mining plan. There is more than a hypothetical possibility that the Petitioner's property retains substantial value for the very use that he proposes. As the Supreme Judicial Court noted:

> "[T]he commission's staff proposed a plan which would have permitted sand and gravel extraction on twenty-five acres, but the plaintiff declined to consider this alternative or modify his proposal. While not conclusive, the staff's plan demonstrated a willingness to permit less extensive mining proposals."

(Pet. App. at 9a.) It is therefore premature for the Petitioner to claim a "categorical taking of his mining estate" (Pet. at 8) and to assert that his claim provides an opportunity for this Court to address the "denominator" question discussed in *Lucas*, 505 U.S. at 1016 n.7. Because the Petitioner's property may still retain substantial value for both sand and gravel extraction and residential development, his categorical taking claim is neither ripe nor valid,

regardless of whether the affected property is the "mining estate" alone or the property as a whole.[8]

(c) Assuming, *arguendo,* that the Commission would not approve any sand and gravel mining operation (or would only approve one that was, by some measure, economically unfeasible), the record is insufficient to establish either the "pre-regulation" value of the property for sand and gravel mining, or the "post-regulation" remaining value of the property for other uses. The trial judge did not find these values, and the Petitioner did not object to the lack of these findings or cross-appeal to the Supreme Judicial Court. The Commission has not been presented with alternative development plans for the site for uses other than sand and gravel extraction,[9] and so it cannot be determined what other uses would be allowed[10] or what values might flow from those uses. As this Court has stated:

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[8] *See MacDonald, Sommer & Frates v. County of Yolo,* 477 U.S. 340, 351-53 & n.8, n.9 (1986) (claim unripe, because rejection of subdivision plan left open possibility that less intensive development would be permitted); *Good v. United States,* 1997 WL 528955, at *19 (Fed.Cl. Aug. 22, 1997) (ripeness doctrine requires good faith effort by developers to satisfy permitting agency after initial denial, reflecting reality that land development often involves process of negotiation); *Southview Assoc., Ltd. v. Bongartz,* 980 F.2d 84, 98 (2d Cir. 1992) (claim not ripe where agency's rejection of subdivision proposal did not preclude submission of another plan for less intensive development located in less critical areas of property, and where agency's decision indicated receptivity to a revised proposal). *Cf., Suitum v. Tahoe Regional Planning Agency,* ___ U.S. ___, 117 S. Ct. 1659, 1662-63, 1667 (1997) (claim ripe where agency had determined that landowner's property could not be developed or used for any productive purpose).

[9] The Petitioner's "futility" argument deserves short shrift for this very reason. It was the Petitioner, rather than the Commission, who refused even to consider alternative mining plans.

[10] As noted *supra* at n.2, not all types or degrees of development would require Commission approval, because the

> "[I]t follows from the nature of a regulatory takings claim that an essential prerequisite to its assertion is a *final and authoritative determination of the type and intensity of development legally permitted on the subject property.* A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes."

MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 348 (1986) (emphasis added); *see also Williamson*, 473 U.S. at 191 (*Penn Central* factors cannot be evaluated until agency "has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question"). This "essential prerequisite" is missing in this case. Consequently this Court should conclude that it is "unable to address the merits" of the Petitioner's claim, *MacDonald*, 477 U.S. at 348, and should deny his petition.[11]

(d) Although the Petitioner contends that his taking claim is ripe for this Court's review, he adopted a contrary position in the brief he submitted to the trial judge following the Supreme Judicial Court's remand. In that brief, he argues that the case was

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Commission reviews only those projects that exceed the thresholds for developments of regional impact.

[11] The Supreme Judicial Court considered both the ripeness issue and the substantive merits of the Petitioner's takings claim, and vacated the trial court's judgment on both grounds; either ground would have been dispositive. The Supreme Judicial Court was able to *reject* the merits of the claim, because there was "ample" evidence that the property had substantial value for uses other than sand and gravel removal. (Pet. App. at 9a n.5.) It would not have been able to *uphold* the claim on its merits, because the record did not support a finding of no remaining productive use. (*Id.* at 7a, 9a-10a.) The burden is on the property owner to show that he has been denied all economically beneficial use of the property. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 n.6 (1992).

remanded for the trial judge to determine (i) whether the Commission would approve less extensive sand and gravel operations, and (ii) what the "after-imposition" (i.e., post-regulation) value of the property would be. The Petitioner contends in that brief that the judge has sufficient evidence before him to determine that the Commission would not approve other mining proposals, and that the taking claim is therefore ripe. The Petitioner admits, however, that "[a]bsent such determination it is impossible to decide, if a taking has occurred." Likewise, he admits that the trial judge "made no determination of the 'after imposition' value of the [Petitioner's] property," and that "this determination is necessary to address the taking claim."[12] The Petitioner requested that the trial judge allow additional briefs and take additional evidence on the value of the property. In short, the Petitioner proclaims to the trial court on remand that the Supreme Judicial Court did not reach a final determination on either the ripeness or substantive takings issues and remanded the case for further findings on each issue.

If, as the Petitioner contends in the remand proceedings, the Supreme Judicial Court has not made a final determination on the issues presented in the petition for certiorari, then this Court is bound by statute to deny the petition, because there has not been a final judgment or decree by the State's highest court respecting the federal question. 28 U.S.C. § 1257(a). As a matter of logic as well as law, this Court should not review the Petitioner's Federal claims while he is still pursuing a decision from the trial judge on those same claims and where any further decisions by the judge will be subject to

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[12] See relevant pages from "Plaintiff's Brief Re: Scope of Remand" (Sept. 5, 1997), appended hereto. The Respondent argued to the trial judge that the Supreme Judicial Court did make a "final adjudication" of the taking claim, and that the case was remanded solely to address the statutory claim for judicial review of the Commission's decision.

additional appellate review by State courts. *See Costarelli v. Massachusetts*, 421 U.S. 193, 196 (1975) (important purpose of "final judgment" requirement is to prevent interference with state proceedings when underlying dispute may be otherwise resolved).[13]

(e) The Petitioner contends that the Supreme Judicial Court erred in treating ripeness as a jurisdictional issue not subject to concession or waiver at the trial level. This argument merits only a brief answer. The Commission denies that it "waived" that issue; it did in fact address the ripeness issue in its post-trial memorandum. Furthermore, this Court has spoken conclusively on its right to address the ripeness issue *sua sponte*. *See Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 57 n.18 (1993) (ripeness question may be raised on the Court's own motion, and the Court is not bound by the wishes of the parties); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 138 (1974) (Court not bound by parties' concessions in deciding ripeness, because issue involves exercise of judicial restraint from unnecessarily deciding constitutional issues); *see also Suitum v. Tahoe Regional Planning Agency*, ___ U.S. ___, 117 S. Ct. 1659, 1669 (1997) (Court addresses "fitness to review" ripeness requirement, raised by defendant for first time); *Bateman v. City of West Bountiful*, 89 F.3d 704, 706 (10th Cir. 1996) (ripeness is issue of subject matter jurisdiction). This Court should respect the right of State courts to adhere to the same policy. Indeed, while the existence of ripeness in a taking claim may be a Federal question because of the constitutional implications, the Petitioner has not shown that a constitutional right is put at risk by procedural rules governing when the ripeness issue may be raised, and by whom.

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[13] This case does not fall within any of the categories of cases where finality may be found despite the existence of further State proceedings. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 479-485 (1975).

CONCLUSION

For the foregoing reasons, the Respondent respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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